



EMPLOYMENT TRIBUNALS

Claimant: Mr P Hall
Respondent: Transport for London
Heard at: East London Hearing Centre (in public)
On: 22 February 2023
Before: Employment Judge Moor

Representation

Claimant: did not attend
Respondents: Miss R Thomas

JUDGMENT

The Claimant acted unreasonably in withdrawing his claims at 17.07 the day before the hearing of 23 February 2023.

I exercise my discretion to make an award of the costs incurred by such conduct, namely the reasonable costs of preparing for the hearing of 23 February 2023.

The Claimant must pay to the Respondent £2,940.00 in respect of costs (including VAT).

REASONS

1. The Respondent applies for an order that the Claimant pay the costs of hearing preparation and attendance in relation to the preliminary hearing (in public) on 22 February 2023.

Procedural History

2. For the procedural history of this case I refer to the Judgment sent to the parties dismissing the claims upon withdrawal ('the Dismissal Judgment') and my judgment of November 2022 in which I struck out parts of the claims (the November 2022 Judgment) and the Order sent to the parties on 24 February 2023. (I dismissed the claims against the Fourth Respondent on 22 February 2023 at the hearing.)
3. Written notice of the hearing on 22 February 2023 was sent to the parties on 1 December 2022. It was listed orally at the hearing on 17 November 2022. The issues at the 22 February 2023 hearing included to consider whether claims 2, 3 and 4 or any part of them should be struck out as having no prospect of success; or whether deposit/s should be paid as a condition of continuing with claims 2, 3 or 4 or any allegation within them (see paragraphs 94-97 of the November 2022 Judgment); and to make case management orders to prepare the claims for the 5 day final hearing listed to begin on 2 May 2023.
4. Also in November made Case Management Orders to ensure that the 22 February 2023 hearing was effective Order'). These orders included that the Claimant should provide a statement of his means by 15 March 2022. This was a typographical error, given that means may have been one of the matters I had to consider at the February 2023 hearing. I corrected this error in correspondence in early February 2022. It was varied so that the Claimant was ordered to send a statement of his means no later than 48 hours before the hearing.
5. I described, in the February 2023 Order, the adjournment applications the Claimant had made prior to the February 2023 hearing, all of which were refused:
 - 5.1. *On 14 December 2022, the Claimant had applied to postpone the final hearing [in May] for various reasons including that he intended to make a new claim or an application to amend (not yet particularised) and **his fear that he may not be well enough because of the need to prepare for another hearing in April 2023.** By letter on 6 January 2023 I refused that application with reasons. The claims are already much delayed and I was concerned at the serious risk of injustice if the claims were postponed any further. The possibility of future claims or applications to amend was, in my view, an insufficient reason to postpone.*
 - 5.2. *On 20 February 2023 (2 days before this hearing), the Claimant applied to adjourn proceedings **primarily because of his representations to the statutory regulator.** This application was refused by Acting Regional Judge Burgher on the same day. **While the Claimant referred in general terms to 'wellbeing' in this application, he did not provide any medical evidence or***

state that he was too unwell at present to pursue his claims.

- 5.3. *The wider context is that the Claimant is disabled by reason of depression and anxiety. His first claim against the First Respondent was heard at a full hearing and determined. The Claimant was too unwell at one point to take part in that hearing and provided medical evidence to support a postponement of it and to extend that postponement. He did not provide evidence beyond a certain point [and] the Tribunal heard the claim in his absence. **He is well aware that he must provide clear medical evidence to justify a postponement.***
- 5.4. *The Claimant had returned to work, until his resignation on 23 January 2023.*
- 5.5. *The Claimant sought a reconsideration of AREJ Burgher's decision on 21 February 2023. He **relied on issues about disclosure and 'that it would be unfair given my circumstances of my deteriorating health.... to go ahead tomorrow'**. He said a postponement would be a reasonable adjustment. **He did not provide any medical evidence or describe his health any further.** This request for reconsideration was refused by AREJ Burgher on the same day at 15.11. (Emphasis added.)*
6. I note that, because these applications for postponement were made less than 7 days before the hearing, Rule 30A of the Tribunal Rules required the Claimant to show there were 'exceptional circumstances' justifying them.
7. In an email on 17.07 on 21 February 2023, the very end of the day before the hearing, the Claimant withdrew all of his claims '*for health reasons*'. He stated the hearing 'could be vacated'. He referred to Rules 51 and 52 and stated he wished to 'reserve his right to bring another claim' against the First Respondent. I dismissed the claims against the Fourth Respondent upon withdrawal that day. But before deciding whether to dismiss the claims against the First Respondent, I ordered that the Claimant provide more information about this intended new claim. I gave reasons in the February 2023 Order for doing so. After he explained his position, I gave judgment dismissing the claims on withdrawal. The Claimant again referred to his poor health as the reason for withdrawal.

Costs Application

8. The Respondents made a costs application on 1 March 2023 respect of the fees incurred by the Respondent in preparing for and attending the preliminary hearing which took place on 22 February 2023 ("the PH").

9. The Claimant responded to it on 6 March 2023.
10. After some delay due to the wrong address being used for the Claimant, it is now possible for me to address the costs application.

Submissions

11. The Respondent argues that the Claimant acted unreasonably in the way he has conducted the proceedings. They seek costs under Rule 76(1)(a) of the Tribunal Rules 2013. The Respondent submits:
 - 11.1. from the procedural history, the Claimant understood he needs to provide medical evidence to justify a postponement. It argues that the Claimant did not even describe in any detail his health problems;
 - 11.2. the Tribunal had already decided that the Claimant's disclosure request would be dealt with as part of the preliminary hearing;
 - 11.3. the withdrawal was so late that the Respondent had already incurred costs in preparing for the preliminary hearing;
 - 11.4. the withdrawal of 21 February 2023 was ambiguous, because the Claimant stated he reserved the right to bring another claim, therefore Counsel attended.
12. The Claimant makes the following points in response:
 - 12.1. He alleges that after 17 November 2022 and prior to his resignation on 23 January 2023 the Respondent's conduct led him to resign. He believes this conduct, which he does not describe, was designed to cause his health to suffer and ultimately to lead to a withdrawal. He says, '*It was due to a rapidly deteriorating health situation brought about by the Respondent that I decided to withdraw.*'
 - 12.2. He argues that even if he had been well enough to attend the February hearing, he 'had the option to request judicial mediation' and this would have put the Respondent to similar costs as are now being sought.
 - 12.3. He suggests that the Tribunal could order production of his medical records which would reveal the Respondent's conduct.
 - 12.4. He suggests that the Respondent is a large publicly funded organisation and the costs are therefore of little value to them.

Legal Principles

13. Rule 76 provides that:

A tribunal may make a custom order and shall consider whether to do so where it considers that (a) a party has acted... Unreasonably... In the way that the proceedings (or part) have been conducted.

Unreasonably is given its natural meaning. I should bear in mind the context, and not hold litigants in person to the same standards as a professional representative.

14. Rule 74 provides that no order shall be made unless the paying party has had a reasonable opportunity to make representations in response to the application.
15. Costs means 'fees, charges etc' incurred by or on behalf of the receiving party.
16. Rule 84 provides that I may have regard to the paying party's ability to pay:

In deciding whether to make a costs ... order, and if so in what amount, the Tribunal may have regard to the paying party's ... ability to pay.

17. Thus, if I consider there has been unreasonable conduct, I may make a costs order but I do not have to do so. I must consider whether to exercise the discretion to do so. In doing so, I may take into account a party's ability to pay. Further, in considering the amount of any award I may consider a party's ability to pay. If I do not take it into account I should explain why.
18. I bear in mind the principle set out in Gee -v- Shell UK Limited [2003] IRLR 82. Sedley LJ said:

It is nevertheless a very important feature of the employment jurisdiction that it is designed to be accessible to ordinary people without the need of lawyers and that in sharp distinction from ordinary litigation in the United Kingdom losing does not ordinarily mean paying the other side's costs.

19. In McPherson v BNP Paribas (London Branch) [2004] IRLR 558 an application for costs followed a withdrawal by a claimant. Mummery LJ made the following points in his judgment:

19.1. at paragraph 28, that it would be unfortunate if we had a regime as to costs whereby claimants who withdrew would automatically face an order for costs, thus discouraging anybody from ever withdrawing.

19.2. at paragraph 29, that on the other hand, tribunals ought not to adopt a practice which encourages speculative claims, only for them to be withdrawn in the last week or two before the hearing, when no offer of settlement has been made.

19.3. and at paragraph 30,

The solution lies in the proper construction and sensible application of Rule 14 (as it then was). The crucial question is whether in all the circumstances of the case the claimant withdrawing the claim has conducted the proceedings unreasonably. It is not whether the withdrawal of the claim in itself is unreasonable”.

Application of Legal Principles

Was there unreasonable conduct?

20. First, I must consider whether the Claimant has acted unreasonably in the way that he conducted this part of the proceedings. There are arguments on both sides.
21. I keep at the forefront of my assessment, the very important principle that costs do not generally follow the event in Tribunals as explained in Ge. I should not lose sight of this principle when considering a particular application. The Respondent must persuade me that the Claimant has conducted the claims or part of them unreasonably. This means more than unwisely. I should consider all of the circumstances of the withdrawal, what I know of the Claimant and his circumstances, before applying the test.
22. I take the following factors into account:
 - 22.1. the Respondent is right to centre its argument on the last-minute nature of the withdrawal, after efforts to postpone had failed, rather than the withdrawal itself. It is the last-minute nature of the withdrawal that put them to cost: the bulk of the preparation being the few days before the hearing. The Claimant knew about the hearing and the issues well in advance, giving him good time to consider his position, a withdrawal so late in the day is a factor pointing to unreasonable conduct;
 - 22.2. the Claimant only withdrew after his very late applications to postpone had failed. The first of those applications made two days before the hearing was not made on the basis of ill health but a submission about the regulator. At this stage the Claimant appeared to want to go ahead with his claims. He has not explained why, within 48 hours, that view changed except by a very general reference to deteriorating health;
 - 22.3. even now that the Claimant has referred to his deteriorating health as the reason for the withdrawal, he has made no attempt to describe his difficulties and has not provided the Tribunal with any supporting evidence. His disability is anxiety and depression, and it is probably reasonable for me to assume that the deterioration has been in relation to mental health. But as to the nature and speed of the deterioration what information I do have does not

suggest a very sudden decline. On the Claimant's own case the deterioration was bad enough for him to resign from work a month before the hearing on 23 January 2023. There is nothing in the Claimant's response to this application that enables me to find that the deterioration was so fast that it explains the lateness of the withdrawal;

22.4. I take into account that the Claimant is a litigant in person and do not hold him to the higher standard of a professional representative. I have made a careful attempt at empathy here (while recognising the limitations of the judicial viewpoint). I have put myself in his shoes on the information he has given me and the procedural history. I draw two points from this:

22.4.1. The Claimant has more experience than most litigants in person of Tribunal litigation through pursuing claim 1 to a lengthy hearing. He knew from that claim that, once his ill health was no longer evidenced by medical evidence, the Tribunal heard the last few days of that claim in his absence. Yet he has not provided the Tribunal with any supporting medical evidence of his decline.

22.4.2. The Claimant is an intelligent, able person not confused by Tribunal proceedings. He was well able to correspond with the Tribunal until the last day before the hearing. He made coherent submissions in writing. He has put his case on his own behalf well and with persistence. I saw him do so at the November 2022 hearing. The Claimant knows about the Tribunal Rules. His withdrawal email shows that he had informed himself about Rules 51 and 52. I realise that corresponding and attending require different effort, but my point here is that the Claimant is not to be taken as entirely without experience of the Tribunal process.

23. I conclude that, in withdrawing the claims so late in the day before the 22 February 2023 hearing, the Claimant acted unreasonably. I have applied the standard of a reasonable litigant in person. I conclude that such a late withdrawal was unreasonable because there was plenty of time for the Claimant to decide what to do once he had notice of the hearing and after the deterioration in his health leading to his resignation. Instead the Claimant corresponded with the Tribunal and Respondent as if he intended to continue with his claims and there is insufficient information before me that would reasonably justify such a late withdrawal. I find that anyone, even if not a lawyer, would appreciate that the other party would have had to prepare for a hearing before 5pm the day before. It was unreasonable of the Claimant to leave his withdrawal so late.

Whether to exercise discretion

24. Now that I have found the Claimant to have conducted a part of the claims unreasonably, I must consider whether to exercise my discretion to award costs.
25. That the Respondent is a publicly funded body does not help the Claimant. I disagree with his argument that somehow these costs are less important to it because it is a large publicly funded body. To the contrary, the Respondent must be prudent in its spending because it is funded by the public. I regard this as a neutral factor.
26. The Respondent has been reasonable in confining its application only to the costs, unnecessarily incurred, for the February 2023 hearing. Plainly overall the withdrawal will save it further cost, but the point here is that their preparation costs for the February hearing could have been saved had the Claimant acted reasonably and withdrawn earlier.
27. The Claimant did not comply with the order to provide information about his means. He has not volunteered information about his means in his response to the costs application. He has had, therefore, two opportunities to provide the Tribunal with information about his ability to pay. It is not therefore necessary, in my judgment, in the interest of justice to provide him with a third opportunity. I take into account that he has worked as an engineer for around 15 years with the Respondent and is likely therefore to have built up some savings or capital in that time.
28. I have also taken into account that the Claimant is disabled and has indicated a deterioration in his health. This is the most weighty reason against exercising my discretion and I have thought about it carefully. I recognise that litigating for oneself is a stressful activity, even more so when disabled by mental ill health. I realise too that the Claimant had to make a difficult decision about whether to continue the claims had had pursued with energy until February 2023 or not to do so. The deadline of another hearing can really focus the mind. Against that I see that he was appearing to pursue his claims right up until the last moment and only when his last-minute application to postpone had not succeeded did he withdraw. This shows me that he was addressing himself to his cases with some vigour and that he was thinking strategically. Overall, while it is not an easy balance to reach, I do not consider that the Claimant's poor mental health in this context can excuse the unreasonableness of his conduct in withdrawing so late which inevitably put the Respondent to further cost.
29. I therefore exercise my discretion to award costs in relation to the preparation of the 22 February 2023 hearing.

Amount of Costs

30. The Respondent's schedule of costs totals £4,490 plus VAT.

31. The Respondent says it has incurred legal fees of £1,872 in preparing counsel's brief, finalising and producing bundles. The solicitor's rate is £240 per hour plus VAT. This equates to 7.8 hours of her time. I take into account that I gave directions that the bundle for the November 2022 could be added to for the February 2023 hearing, to limit costs of preparation. A wholly new bundle should not have been prepared. Further, the production of bundles ought reasonably to have been dealt with by a paralegal or far more junior fee earner, overseen by the solicitor. Counsel was familiar with the issues in the claims, it seems to me therefore preparation of the brief would not have been at all time-consuming and straightforward. Overall the work could have been overseen in 2 hours by the solicitor and the remaining hours of preparation completed at much lower cost. On a rough and ready assessment I would allow £1,200.00 plus VAT for the solicitor's preparatory work.
32. I agree that counsel's fee of £1,250.00 plus VAT is reasonable: this was a preliminary hearing likely to last all day in relation to claims that were legally and factually complex. At the hearing, the Respondent hoped to persuade the Tribunal to strike out all or part of the claims and, in any event, to clarify the issues in them. It was therefore a very important hearing, which would have involved several hours of careful preparation in advance, plus the day in Tribunal, justifying such a brief fee. This fee was incurred despite the Claimant's last-minute withdrawal and Ms Thomas assisted me on the day in figuring out the way head, given the Claimant's wording of his withdrawal.
33. The Respondent claims the costs of applying for costs: I do not know whether they corresponded in advance seeking costs from the Claimant to avoid the application. Further, the costs application could have been made orally at the February hearing. In those circumstances I do not allow this cost.
34. I do not allow the costs of responding to the postponement applications: my decision is that the unreasonable conduct was in relation to the last-minute withdrawal only.
35. The costs I regard as reasonable are therefore £2,450 plus VAT equalling £490, a total of £2,940.00.
36. I have gone on to consider the Claimant's ability to pay. On the limited information available to me I consider that his professional position over a long period of time will have allowed him to build up sufficient savings or capital to afford these costs.

**Case Numbers: 3201450/2020, 3201877/2021
3201533/2021 and 2300144/2022**

37. I order the Claimant to pay to the Respondent's costs of £2,940.00.

**Employment Judge Moor
Dated: 10 May 2023**