Case number: 2601341/2022

EMPLOYMENT TRIBUNALS

Claimant: Mr Dale Heath

Respondent: Frank Wright Limited T/A Trouw Nutrition GB

APPLICATION FOR A COSTS ORDER

Heard: In Chambers, on papers

On: 15 May 2023

Before: Employment Judge Clark (sitting alone)

JUDGMENT

1. The claimant shall pay the Respondent's costs of attending the preliminary hearing on 31 March 2023 assessed in accordance with rule 78(1)(a) in the sum of **£700**.

REASONS

1. This is a paper determination to decide the respondent's application for costs following the withdrawal of the claim by the claimant. More specifically, the respondent had instructed Counsel to attend a remote preliminary hearing on 31 March 2023 at which the tribunal was due to determine the question of time limits. Counsel was in attendance in good time. The claimant was not. In an email timed at 9:52am, that is 8 minutes before the start of the hearing, Mr Heath withdrew his claims.

2. The respondent's application was based on the unreasonable conduct in doing so at that time but was limited to Counsel's fee of £700 plus VAT. In the absence of the claimant I was reluctant to decide the matter without first giving Mr Heath an opportunity to respond to the application and not least because withdrawal in itself is not something that can be said to be unreasonable. I therefore gave Mr Heath the opportunity to give an explanation for the timing and circumstances of the withdrawal, provide any information about his means and to indicate whether he wanted the application dealt with at a hearing or not. A detailed explanation of how the application had come about was sent to him on 5 April

2023 giving him until 14 April 2023 to reply and ordering the respondent to provide evidence of its costs and VAT status.

3. Mr Heath did respond by email on 12 April 2023. In summary, he said:-

    a. No costs order should be made in any sum.
    b. He explained he and his partner were in difficult financial circumstances and were being supported by family. He said he earned at the national minimum wage and had encountered several weeks where he did not get paid.
    c. In respect of his last-minute withdrawal, he said that he had to attend work because his holidays were limited to certain periods and he was not allowed to take any extra days off work.
    d. His partner, who had previously had her own claim against this same respondent, had offered to conduct the hearing but felt too stressed to do so on the morning of the hearing and he had no other option than to withdraw the claim.
    e. He apologised for the inconvenience to the tribunal and the respondent.
    f. There was no request for an attended hearing.
    g. There was no documentation attached to the response supporting the contentions made.

4. The question for me is whether the withdrawal of the claim in the circumstances in which it happened amounted to the claimant conducting the proceedings "vexatiously, abusively, disruptively or otherwise unreasonably" under rule 76(1)(a). If it does, I must then consider whether the exercise the costs discretion that gives me. If I do, I must then assess the costs claimed.

The Costs Threshold

5. Mr Heath engaged with the rules and process to present a claim in the proper format. He did so against a background of his partner having engaged with the process. The correspondence from the tribunal in his case includes, as it does in all cases, reference to the guidance and rules which can be found freely online. I do not accept Mr Heath believed his only option was to withdraw the claim. The word withdraw is itself one that many claimants would not how or use without some research into the rules. I note the email withdrawing it stated on its face how it had been copied to the respondent, itself a requirement of the rules. His past engagement demonstrated some awareness of the rules of procedure, at least as a litigant in person.

6. He previously navigated a telephone preliminary hearing to deal with case management, completing and submitting an agenda. When that was eventually heard on 7 November 2022, itself after a short postponement of the tribunals making, he attended together with his partner who represented him as a lay representative. His claim was maintained at that hearing.

7. Mr Heath has not stated when his current employment started but from 7 November 2022, or at the latest on receipt of the orders sent following it sent on 16 November 2022, he was aware that this preliminary hearing was to be held on 31 March 2023. At no point during the intervening period 4½ months did he or Ms Kesckes contact the tribunal or respondent to say that there was likely to be any difficulty in him getting the time off work. He must have known that was the case when he belatedly filed his witness statement for the hearing about a week earlier. He has given no evidence of any request to take time

off work or his employer's response to it which leaves me concluding that he has not asked. If the present employment started since getting notice of the hearing, which he has not stated, but if it did, he has equally failed to explain why he did not raise his need to attend this hearing with his new employer when taking up the employment. If he did ask, he has not explained why he did not then approach the tribunal upon any such request being refused by the employer. I am left concluding that he knew of the fact that he would not be in attendance on 31 March 2023 from mid-November 2022 and that he did nothing to resolve that problem. I am left with the conclusion that he had no intention of attending all along.

8. That failure is compounded by the fact that I do not accept the explanation that Ms Kesckes suddenly let him down at the last minute and I reject that for three reasons. First, she had appeared on his behalf already, not to mention the experience of the claim she apparently brought on her own account against the same respondents. Secondly, he had been directed in correspondence to the rules and guidance within which various options clearly exist when a party genuinely cannot attend a hearing and I am satisfied he and/or Ms Kesckes have been able to navigate the proceedings so far in a way that indicates some awareness at least of their existence. Thirdly, he does not give that as a reason in his contemporaneous correspondence. Had that been the case, it is more likely than not that a claimant otherwise seeking to prosecute their claim reasonably would have indicated the difficulty they suddenly found themselves in.

9. The claimant had complied with the case management orders in advance of this hearing which reasonably indicated his continued intention for the hearing to proceed. The respondent complied with the orders addressed to it. It compiled and served hard copy bundles. Through its solicitors, it recently instructed Counsel to represent it at today's hearing.

10. There does not appear to have been any inter-party correspondence as a result of the compliance with those case management orders to give any impression other than this claim was proceeding and it was a claim of value to be defended. Importantly, there has never been any hint that Mr Heath faced any difficulty in attending the hearing.

11. There is every reason to think this claim was brought vexatiously. A claim advanced for the purpose of harassing or exposing the other side to costs without any intention of advancing a legitimate claim of a nature that amounts to an abuse of process is a vexatious claim. Whether this claim technically amounts to vexatious conduct, which I am included to conclude it does, it is not necessary for me to determine because I am wholly satisfied that it is a claim which has been conducted unreasonably. There has been ample time for Mr Heath to raise any difficulties with attendance due to his restrictive work commitments, but he has not. His decision to withdraw, rather than give any explanation of his alleged predicament, is less likely to be the course of someone who was genuinely in that position. I am satisfied that the costs jurisdiction has been engaged.

Whether to make the order

12. The reasons for making it are that costs have unnecessarily been incurred. There is no good reason why the respondent should be forced to carry those costs when they could have been avoided.

13. The reason for not making an order is Mr Heath's plea that one should not be made and that he has limited financial means.

14. I am satisfied there is good reason to make the order, and no good reason not to and therefore do go on to consider the costs claimed. In reaching that conclusion, I have had regard to Mr Heath's stated means in accordance with Rule 84. That is a factor which straddles both whether to make an order and, if so, the amount. Mr Heath was given an opportunity to give details of his means, he has done so but in limited and general terms. He says he is paid on national minimum wage and has suffered several weeks in the year without any income. The national minimum wage currently equates to a full-time salary of around £21,500. Mr Heath does not give details of his hours but by implication from the present circumstances he is working as full time as it can be. Nothing in the information provided causes me to conclude it would be unjust to exercise the jurisdiction to make a costs order.

Assessing the Costs

15. The respondent has limited its costs application to the cost of instructing counsel. It does not seek to recover any of the wider costs conducting its defence. That limits the claim to £700 plus VAT. I have seen evidence of the fee note and accept that cost has been incurred.

16. I am further satisfied that that was a reasonable sum for junior Counsel to attend a preliminary hearing on a substantive matter where evidence would be tested. It is likely to have been no more, and probably substantially less, than if a fee earner from the instructing solicitors had prepared for and conducted the three-hour hearing without instructing counsel. I am satisfied therefore that the sum was both reasonably incurred and reasonable in amount. I am equally satisfied that the instruction and sum incurred was proportionate to the issues in the case.

17. I again consider what I know of the claimant's means. Had the respondent sought costs beyond those incurred at the hearing I may have restricted them due to the claimant's means and or due to the wider consideration of what broad connection existed between the unreasonable conduct and the costs incurred. As they are limited to Counsel's attendance, I have less concern. I do not doubt that the sum is viewed as a significant sum to Mr Heath, but my concern is not such as to require an adjustment as a result of his means. I do not have to limit an order to a sum which can comfortably be paid but that is a consideration. This is a sum which I conclude can be paid, even if it causes some financial pressure. I am therefore ordering that it will be paid by Mr Heath in full with one qualification.

18. The qualification is that the respondent confirmed in response to my order that it was VAT registered as I anticipated would be the case. The VAT charge levied by Ms Kaye is therefore a charge that can be accounted for within its own VAT input tax accounting and to order it to be paid by Mr Heath would amount to a windfall to the respondent. (**Raggett v John Lewis plc [2012] IRLR 906 EAT** applies). The sum to be paid is therefore £700 in total and not the £840 shown on the fee note as the total due.

EMPLOYMENT JUDGE R Clark