



EMPLOYMENT TRIBUNALS

Claimant: Mr A Dunn

Respondent:

Alpha Labour and Recruitment Ltd

COSTS JUDGMENT

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

REASONS

Introduction

1. These reasons should be read in conjunction with my detailed liability judgment dated 8 March 2023 and my case management order dated 10 February 2023
2. The Respondent made an application for costs on 6 April 2023. On 25 April 2023 the Tribunal wrote to Mr Dunn and the Respondent explaining what the issues to be decided in the costs application were. Mr Dunn and the Respondent were required to write to the Tribunal by 2 May 2023 to say whether they wanted the costs application to be decided at a hearing or in writing. Mr Dunn was also required to send any evidence or arguments he wanted to rely on. This included any evidence about his ability to pay costs.
3. On 27 April 2023 the Respondent confirmed that it would prefer the application to be dealt with in writing, especially because it anticipated that Mr Dunn might choose not to take part in a costs hearing, as he had done on 8 March 2023. On 27 April 2023 Mr Dunn also emailed the Tribunal. He did not say whether he wanted a hearing or not. He said the Tribunal should "do what you want." He did not provide evidence but he said that he has no money and no address. He had a debt relief order and said that he had not worked for 10 years apart from bits and bobs.
4. On 19 May 2023 the Tribunal told the parties that I would deal with the costs application in writing. Nothing further has been heard from Mr Dunn or the Respondent since.

Issues

2. The issues for me to decide are:
 - 6.1 Did Mr Dunn behave unreasonably, disruptively, vexatiously or abusively in his conduct of the claims?
 - 6.2 If so, should the Tribunal make a costs order?

6.3 If so, for how much?

Legal principles

3. Rules 76 and 84 of the Employment Tribunal Rules of Procedure 2013 provide, so far as material, as follows:

76 When a costs order or a preparation time order may or shall be made

(1) A Tribunal may make a costs 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

...

84 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.

4. In considering whether to make a costs order, and for how much, the following principles apply:
- 4.1 Litigants without legal representation are not to be judged by the standards of a professional representative - the Tribunal must make an allowance for inexperience and lack of objectivity: see *AQ Limited v Holden* [2012] IRLR 648 EAT.
 - 4.2 The Tribunal must identify the unreasonable conduct, say what was unreasonable about it and say what its effect was: see *Yerrakalva v Barnsley MBC* [2012] ICR 420 CA.
 - 4.3 It is not necessary to link the costs awarded to costs caused by unreasonable conduct, i.e. the receiving party does not have to prove that the unreasonable conduct caused particular costs: see *Macpherson v BNP Paribas* [2004] ICR 1398 CA.
 - 4.4 The Tribunal is not required to limit any costs order to a sum that the paying party can afford to pay: *Arrowsmith*. The Tribunal must, however, give proper consideration to such matters as future earning capacity and the alternatives to making a whole costs order: *Herry v Dudley Metropolitan Council* [2017] ICR 610.

Unreasonable conduct of the proceedings

5. The relevant background is set out in the case management order of 10 February 2023 and the judgment of 8 March 2023.
6. I postponed the original hearing on 10 February 2023 by CVP because Mr Dunn did not have a copy of the file of documents. He could only access them on a mobile phone. He was using the mobile phone to access the hearing too.
7. During that hearing, I tried to explain what would happen next to make sure that Mr Dunn was properly prepared for the next hearing. He repeatedly talked over me, raised his voice, pointed, refused to listen and behaved in a way I described as ranting. More than once I muted him until he was prepared to listen. I set out clearly in writing what the Tribunal would be deciding at the next hearing and what Mr Dunn must do to prepare for it.

I made clear that the Tribunal could not police the implementation of the National Agreements he was relying on, or generally investigate matters of concern. It could only decide complaints that the law said it could decide. In this case, that was a complaint of unauthorised deduction from wages. I ordered the Respondent to send Mr Dunn a hard copy of the file of documents and Mr Collins's witness statement and told him he must bring it to the hearing. I gave him the chance to provide a proper witness statement and told him what it needed to include.

8. On 8 March 2023 the reconvened hearing was listed in Sheffield Employment Tribunal. At the start, Mr Dunn told me that he had only just seen the file of documents. That was because he had refused to provide Ms Weston with an address and had asked her to bring the file to the Tribunal. He had only just collected it. As explained in the judgment, he left the hearing when I told him that it would not be recorded. Before doing so, he was not willing to listen or discuss the situation reasonably. I decided to proceed with the hearing in his absence. I heard evidence from Mr Collins and took into account all the written material provided by the Respondent and Mr Dunn. I dismissed his claim for the reasons set out in detail in the judgment.
9. The Respondent says the Claimant acted unreasonably by:
 - 9.1 Not providing an address for the hearing file to be sent to;
 - 9.2 Not providing a proper witness statement;
 - 9.3 His behaviour at the first hearing;
 - 9.4 His refusal to take part in the second hearing; and
 - 9.5 His conduct of the proceedings generally.
10. I find that he did behave unreasonably, even making allowances for the fact that he is an ordinary working man representing himself in the Tribunal. A significant proportion of the Tribunal's litigants fall into that category, but they make reasonable efforts to follow the Tribunal's orders and co-operate to prepare for and take part in Tribunal hearings. Mr Dunn has not done so. His conduct at the first hearing – repeatedly talking over the Judge, refusing to listen and generally “ranting” was not reasonable. That may have contributed to his failure to prepare properly for the next hearing. His conduct in failing to prepare properly for the next hearing was not reasonable. The first hearing was postponed so that he could have a hard copy of the hearing file, prepare properly for the hearing and take part in it. It was unreasonable not to make arrangements for the hearing file to be delivered to him or collected by him in advance. It was unreasonable not to prepare a witness statement setting out his version of events. These things meant that he was not in a position to take part properly in the hearing on 8 March 2023. His behaviour at the hearing itself was also unreasonable. He was not willing to accept that Tribunal hearings are not generally recorded and he was not prepared to listen or discuss the matter reasonably to see whether his concerns could be addressed in some other way. He walked out when I confirmed that the Tribunal was not going to record the hearing.

Should a costs order be made?

11. The Tribunal has a discretion to make a costs order. I have decided not to exercise it in this case, despite the fact that Mr Dunn has behaved unreasonably.
12. The Respondent's application is limited to the costs associated with attending the hearing on 10 March 2023. I note that it is not necessary to link the unreasonable conduct to

particular costs – costs can be awarded even if the unreasonable conduct has not specifically caused them. However, in exercising my discretion, I take into account that:

- 12.1 it was necessary to postpone the original hearing because it would not have been fair to Mr Dunn to proceed on CVP if he did not have a copy of the file of documents; and
 - 12.2 I was able to determine the claim on the evidence at the hearing on 10 March 2023, even though Mr Dunn behaved unreasonably and walked out.
13. That means that if Mr Dunn had not behaved unreasonably and walked out, it is likely that the Respondent would still have incurred the costs of attending the hearing on 10 March 2023 in any event. In the particular circumstances, I find that it would not be in the interests of justice to make a costs order.
14. I have some doubt about Mr Dunn's statement that he has not worked for ten years. The evidence before me referred to numerous shifts via this recruitment agency during 2020 and 2021. Even so, I approach this decision on the assumption that Mr Dunn does not currently have any means and has outstanding debts. However, he is a skilled labourer and could, if he chose, no doubt secure work as a thermal insulation engineer/lagger. Mr Dunn's ability to pay would not have stopped me from making a costs order in those circumstances. If I had decided to make one, I would have taken it into account when deciding how much to award.

**Employment Judge Davies
7 June 2023**