



EMPLOYMENT TRIBUNALS

Claimant: C (Anonymised due to anonymisation order)

Respondent: R (Anonymised due to anonymisation order)

JUDGMENT ON COSTS

1. The claimant is ordered to pay to the respondent a contribution to costs of £3,460.80.

REASONS

Introduction

2. This is a decision on the respondent's application for costs made at the hearing on 9 January 2023. At that hearing I adjourned the respondent's application to give the claimant an opportunity to make any representations he wished to do so as to why an order for costs should not be granted and to provide evidence of his means. Neither party requested a hearing to determine the costs application and I considered that the application could properly be dealt with on the papers.
3. The costs application followed the tribunal's decision on 9 January 2023 to dismiss the claim because of the claimant's failure to attend the hearing on that day. A small bundle of papers in respect of the costs application was provided to the tribunal by the respondent at the hearing and the tribunal was informed that it had also been sent by email to the claimant.
4. The claimant responded to the application by email on 27 January 2023 and the respondent made further submissions by email on 2 February 2023.
5. There has been a delay in determining the application whilst the hardcopy costs bundle was located by the tribunal and thereafter on account of my other judicial and professional commitments.

The application

6. The respondent seeks an order under Rule 75(1)(a) of the Employment Tribunal Rules of Procedure 2013 that the claimant pays its costs incurred from 1 November 2022. In summary, the respondent contends that the claimant has acted unreasonably in bringing and conducting the proceedings including failing to comply with tribunal orders and failing to prosecute his claim.
7. The respondent produced a costs schedule setting out costs incurred including the first day of the hearing of £17,589.60 including VAT comprising £10,389.60 by way of solicitors' costs and £7,200 by way of counsel's fee.

Facts

8. The claimant was employed by the respondent from 13 July 2015 until 1 July 2020 as a Senior Healthcare Technical Officer.
9. Following a period of early conciliation the claimant presented his claim for unfair dismissal to the tribunal on 30 September 2020.
10. On 25 November 2020 Employment Judge Pritchard made an anonymisation order.
11. The respondent filed its ET3 on 18 December 2020 contesting the claim.
12. On 20 September 2021 a preliminary hearing took place by telephone before Employment Judge Harrington. Case management orders were made and the claim was listed for a 8-day hearing commencing 9 January 2023. The claimant attended that telephone hearing. EJ Harrington also listed a further preliminary hearing on 12 December 2022.
13. On 15 November 2021 the claimant filed further and better particulars of claim and made an application to amend his claim. On 26 January 2022 Employment Judge Nash granted the claimant's application to amend his claim save in respect of his request to include a complaint of wrongful dismissal. In relation to this EJ Nash directed the claimant to set out which additional witnesses were required and why their evidence was materially relevant.
14. On 14 February 2022 the respondent filed amended grounds of resistance.
15. On 11 May 2022 Employment Judge Balogun refused the claimant's application to amend his claim to include wrongful dismissal.
16. On 14 October 2022 the respondent wrote to the claimant on a 'without prejudice save as to costs' basis inviting the claimant to withdraw his claim, putting him on notice that if he did not withdraw his claim by 31

October 2022 and he was unsuccessful at trial the respondent would seek an order that the claimant pay its costs from 1 November 2022. The respondent asserted that it believed the claim was misconceived, had no reasonable prospect of success and the claimant's pursuing it amounted to unreasonable conduct. The letter indicated that the respondent anticipated that its costs to the conclusion of the liability hearing would be in the region of £25,000 plus VAT.

17. On 12 December 2022 a further preliminary hearing took place by CVP before Employment Judge Martin. The claimant failed to attend and it was recorded on the file that the claimant subsequently sent an email to the tribunal providing his telephone number. The number provided was the same number that was contained within his ET1.
18. At the hearing on 12 December 2022 EJ Martin reduced the length of the hearing to 5 days. The start date of 9 January 2023 was retained. EJ Martin further directed the claimant to serve a list of the documents referred to in his witness statements by 4pm on 30 December 2022.
19. The claimant failed to comply with this direction.
20. On 3 January 2023 the respondent resent EJ Martin's order to the claimant asking him to provide the list of documents that had been directed by 9am on 4 January 2023. Having received no response the respondent sent a further email on 4 January 2023 urging the claimant to comply by 9.30am on 5 January 2023. No response to this email was received. On 6 January 2023 the respondent sent an email to the tribunal filing the bundle and witness statements and highlighting the claimant's non-compliance with the direction to serve a list of documents.
21. On 6 January 2023 the respondent wrote to the claimant asking him to confirm if he was intending to attend the trial. Again, no response was received from the claimant.
22. The claimant failed to attend the hearing on 9 January 2023 and his claim was dismissed.

The Law

23. Rule 76 of the Employment Tribunal Rules provides as follows:-

76.—(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 or practice direction or where a hearing has been postponed or adjourned on the application of a party.

24. Rule 84 provides that in deciding whether to make a costs order or in what amount the tribunal may have regard to the paying party's ability to pay.

25. The tribunal does not have to limit a costs order to what the paying party can afford to pay, or is able to pay at the time the order falls to be made **Arrowsmith v Nottingham Trent University [2011] EWCA Civ 797** and **Vaughan v London Borough of Newham [2021] IRLR 713**.

Analysis and conclusions

Stage 1 -the threshold test

26. As to Rule 76(1)(b) I am required to consider whether the claim had no reasonable prospect of success. The merits of the claimant's complaints have not been considered at a hearing. There is considerable factual dispute between the parties and without testing the evidence and clarifying the claim I cannot conclude that the claim had no reasonable prospect of success (although that is not to say that I have formed the view that the claim had a reasonable prospect of success). I therefore do not make an order under Rule 76(1)(b).

27. As to Rule 76(1)(a) there are two aspects for me to consider. I do not make an order on the basis that the claimant has acted vexatiously, abusively, disruptively or otherwise unreasonably in the bringing of the proceedings (or part) for the same reasons I do not make an order under Rule 76(1)(b). I therefore go on to consider whether the claimant has acted vexatiously, abusively, disruptively or otherwise unreasonably in the way the proceedings have been conducted which is a separate issue.

28. The respondent relies upon the claimant's failure to attend the hearings on 12 December 2022 and on 9 January 2023, the claimant's failure to comply with the order of EJ Martin made on 12 December 2022 and the claimant's failure to prosecute his claim generally. The claimant failed to respond to correspondence from the respondent and failed to communicate with the tribunal after 12 December 2022 on which date he had emailed the tribunal providing his telephone number.

29. The claimant's explanation of his conduct as set out in his email to the tribunal sent on 27 January 2023 is that he intended to proceed with his case but *'unfortunate circumstances arose in my private life as I was made temporary homeless since 7th December until 20th January'*. He said that the reason he had not contacted the tribunal or the respondent was that he lost his phone while homeless and only recently replaced the phone once he was not homeless. He further stated *'my phone was*

the only device I had for contact with the tribunal and the Respondent through email or calls'.

30. I do not consider the claimant's explanation satisfactory for the following reasons:

- i) The claimant has not provided any evidence that supports his assertions that he was temporarily homeless or that he lost his phone. Giving him of the benefit of the doubt this still does not explain why he was not able to contact the tribunal or the respondent. I note that the claimant was employed over this period as he has produced a payslip dated 30 December 2022. The claimant provides no explanation as to why he was not able to use a device other than his phone to contact the tribunal or the respondent, both of whose contact details are publicly available and contained within the tribunal papers, over this period. He was able to undertake paid employment but did not take simple steps to make contact with the tribunal or the respondent in respect of his claim.
- ii) The claimant emailed the tribunal on 12 December 2022 providing his phone number which is the same number that was contained within his ET1. This indicates that the claimant was in possession of his phone on this date and had access to emails. He has not provided an explanation as to why he did not attend the hearing on 12 December 2022 in those circumstances.
- iii) The claimant has been aware that his claim was listed for a hearing commencing on 9 January 2023 since the preliminary hearing on 20 September 2021. He was aware of the hearing on 12 December 2022 on the same date. Both hearing dates were contained within the case management order which were sent out to the parties by the tribunal. I note that the claimant referenced the same case management orders in his further and better particulars of claim so I am satisfied that he had received these.
- iv) The claimant's witnesses did not attend on 9 January 2023 to give evidence. I am satisfied that if the claimant intended to pursue his claim he would have notified his witnesses of the hearing date well in advance to ensure their availability. It therefore follows that either he did not notify them to attend at all or having previously notified them of the hearing he subsequently told them not to attend. This leads me to the conclusion that the claimant did not intend to pursue his claim.

31. The conclusion I reach is that the claimant's failure to engage with proceedings amounts to unreasonable conduct. It was his claim to pursue, and having presented it, it was for him to pursue. It was open to the claimant to notify the tribunal and the respondent of any personal circumstances that would impact upon the hearing dates or to seek an adjournment of the hearing. He did not and I am satisfied that the threshold test is therefore met.

32. I therefore turn to consider whether to make an order at all, and if so, in what amount.
33. Whilst I acknowledge that a litigant in person is to be judged less harshly than a party who is professionally represented in the circumstances that I have outlined in considering whether threshold is met I am satisfied it is nonetheless appropriate to exercise my discretion to make a costs order in favour of the respondent.
34. Turning to the amount of the costs order, the respondent seeks costs from 1 November 2022. I have not concluded that the respondent is entitled to costs on account of the conduct of the claimant prior to 12 December 2022. I therefore consider the costs from that date forwards. The respondent has produced a breakdown of time entries for the work undertaken and from that I calculate solicitors' cost incurred from and including that date to total £2,652 to which VAT must be added bringing the figure to £3,182.40. Counsel's fee, disregarding the refresher fees incurred on a daily basis was £7,2000 including VAT giving an overall total of £10,382.40. Neither the fees in preparing for the hearing or counsel's fee are remarkable.
35. I am not required to take the claimant's ability to pay into account, but I may do so. The claimant has produced a payslip showing that he earns £1,424.31 a month. He states that he has outgoings of £900 in respect of rent, travel and household bills leaving him with £400 to £500 to meet essentials. The respondent challenges the claimant's expenses pointing to the fact that the claimant says he lives at home with his mother. The claimant also points to the fact that the claimant has not mentioned or made any disclosure about savings. I do not assume that the claimant lives with his mother rent free and I accept that the claimant may well have limited disposable income. The respondent is correct that the claimant has not provided any information in respect of any savings that he has.
36. Considering this information in the round and acknowledging that this is a discretionary exercise I make an order for the claimant to make a contribution of one third of the respondent's costs from 12 December 2022 up to and including the date of the hearing and dismissal of his claim. I therefore make an order in the sum of £3,460.80 including VAT. I am satisfied that the claimant can pay such a sum within a reasonable period of time.

Employment Judge **Kumar**
Date: 18 May 2023