



## EMPLOYMENT TRIBUNALS

**Claimant**

**Mr Y Sheikh**

**v**

**Respondent**

**London Underground Limited**

**At: Central London Employment Tribunal**

**On: 5 July 2023**

**Judge: Employment Judge Brown**

## COSTS JUDGMENT

**The judgment of the Tribunal is:**

- 1. The Claimant acted unreasonably in continuing with his claim after 6 April 2023 and failing to withdraw his claim.**
- 2. It is appropriate to make a costs order against him.**
- 3. The Claimant shall pay the Respondent a total of £4,470 costs.**

## REASONS

### **Background**

- 1. By an oral judgment on 8 June 2023 I struck out the Claimant's claim for unlawful deductions from wages against the Respondent. The Claimant had not attended the Final Hearing listed for that day.**
- 2. I gave oral reasons for my strike out judgment, saying that the Claimant had not complied with the orders of the Tribunal and had not actively pursued his claim. I said that it was not possible for there to be a fair final hearing that day when the Respondent did not know the nature of the claim, because the Claimant had failed to provide particulars ordered. I said it was proportionate to strike out because lesser sanctions, such as an unless order, were not appropriate; the Claimant's previous failure to comply with the orders of the Tribunal and to engage with the proceedings was so thoroughgoing that there appeared to be no likelihood that the Claimant would ever comply with orders and engage with the proceedings.**
- 3. The Respondent then made an application for costs. It produced a costs warning letter it had sent to the Claimant on 1 June 2023.**

4. As the Claimant had not attended the hearing, I gave orders for the fair determination of the costs application. I ordered: “
  - 1) By 12 June 2023 the Respondent shall send to the Claimant a copy of its 1 June 2023 costs warning letter and a brief breakdown of its costs.
  - 2) By 22 June the Claimant shall respond in writing to the Respondent’s costs warning letter, saying whether he agrees that he should pay the Respondent’s costs and, if he does not agree to pay the costs, why he does not. He shall also say whether he is content for the costs application to be decided in writing by a Judge, rather than at a hearing when the Claimant can attend. The Claimant shall send his reply to both the Tribunal and the Respondent.
  - 3) If the Claimant does not respond, the costs application will be decided by EJ Brown in writing. In those circumstances, by 29 June 2023, the Respondent shall send a short bundle for the costs decision, including the Respondent’s 1 June 2023 written costs warning letter and a short breakdown of the costs.”
5. The Respondent did write to the Claimant on 8 June 2023, attaching a copy of its 1 June 2022 Cost Warning letter and a breakdown of the Respondent’s costs and asking that he reply by 22 June 2023. The Respondent advised the Claimant that, if he failed to respond, the Tribunal would deal with the application in writing.
6. The Claimant did not reply.
7. The Respondent sent a short Bundle to the Tribunal, including the Respondent’s 1 June 2023 written costs warning letter and a breakdown of the costs it sought. It copied this correspondence to the Claimant.
8. I decided the Respondent’s costs application on the papers.

### **The Background**

9. The Respondent’s 1 June 2023 costs warning letter warned the Claimant, amongst other things, that if the Hearing on 8 June 2023 proceeded and the Claimant was unsuccessful, the Respondent would ask for its costs.
10. The Respondent said that, by a letter dated 6 April 2023, it had made an application that the Tribunal strike out the Claimant’s claim because he had not complied with the case management Orders made by the Tribunal during a Preliminary Hearing on 10 February 2023 and appeared not to be actively pursuing his claim.
11. The Respondent said that, as set out in its strike out application, it had made numerous attempts to contact the Claimant and to remind him of his obligations and the Orders made by the Tribunal. It had also written to the Claimant by email of 26 May 2023 asking him to confirm by 29 May 2023 whether he was actively pursuing the claim and intended to provide the information required by the Orders. The Claimant had not responded to any of the correspondence and had not provided further and better particulars of his claim or a schedule of loss as required by the Tribunal’s Orders.

12. The Respondent said that it had incurred costs preparing for the Hearing, and that it would incur further costs attending the Hearing. It said that it anticipated that its fees would be around £3,750 plus VAT.
13. The Respondent's costs warning letter set out that a Tribunal has the power to order a party to pay the legal costs and expenses incurred by another party in the circumstances set out in r76 Employment Tribunals Rules of Procedure 2013. It explained that those circumstances included where a party has, in bringing or conducting the proceedings, acted vexatiously, abusively, disruptively or otherwise unreasonably. The Respondent stated that the Claimant's failure to actively pursue his claim meant that he had behaved unreasonably by bringing the claim.
14. The Respondent said that, if the Claimant withdrew his claim by 12 noon on Monday 5 June 2023, the Respondent would not pursue the Claimant for its costs associated with defending the claim to date.
15. The Claimant did not reply to the costs warning letter, or the Respondent's 8 June letter and did not seek a hearing. I did not know anything about his income or assets.
16. The Respondent seeks its costs in the sum of £4,470 plus VAT, comprising:
  - 16.1. The Respondent's solicitors' fees : £3,220 plus VAT
    - 16.1.1. Preparing costs warning letter : £360
    - 16.1.2. Preparing witness statement, including liaising with the Respondent's payroll team for an explanation of pay deductions - £1,250
    - 16.1.3. Preparation for hearing, including briefing counsel, finalising and producing bundles and liaising with the Respondent's witness - £1,250
    - 16.1.4. Preparing a schedule of costs and applying for costs - £360

16.2. Counsel's fees for full hearing : £1,250 plus VAT

17. The Solicitor rate claimed is £240/hour (plus VAT).

### **Relevant Law**

18. *Rule 76 Employment Tribunal Rules of Procedure 2013* 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 ... has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that proceedings or part have been conducted..."*

19. The Tribunal must consider making an order for costs where it is of the opinion that any of the grounds for making a costs order has been made out.

20. Following *Hayden v Pennine Acute NHS Trust* UKEAT/0141/17, the Tribunal should take two-stage approach:

20.1. Consider whether any of the grounds in *r76(1)(a)* have been established;

20.2. Consider whether, in all the circumstances of the case, a costs award is merited, *Ayoola v St Christopher's Fellowship* UKEAT/0508/13.

### **Unreasonable Conduct**

21. The failure by the Claimant to “address their minds to [the prospects]”, or to engage with a Respondent’s costs warning letter, which would have led them to an earlier assessment of the merits of their claims, can justify a costs award, *Peat v Birmingham City Council* UKEAT/0503/11/CEA.

### **Exercise of Discretion**

22. In *Barnsley Metropolitan Borough Council v Yerrakalva* [2011] EWCA Civ 1255 Mummery LJ stated (at para 41) that “the vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had”.

23. It is usually appropriate for a litigant in person to be judged less harshly in terms of his or her conduct than a litigant who is professionally represented, given that “a lay person may have brought proceedings with little or no access to specialist help and advice. This is not to say that lay people are immune from orders for costs: far from it, as the cases make clear”, *AQ Ltd v Holden* [2012] IRLR 648, EAT at [32]-[33].

24. A party’s ability to pay is also a factor which the Tribunal may consider in deciding whether to make a costs order and, if so, in what amount (*ET Rules 2013, rule 84*).

### **Discussion and Decision**

#### **Unreasonable Conduct**

25. I decided that the Claimant acted unreasonably in continuing with his claim after 6 April 2023 when the Respondent’s solicitors applied for strike out on the basis that he was not actively pursuing his claim.

26. He failed to engage with the claim at all thereafter, but also failed to withdraw it. He thereby ensured that the Respondent incurred expenses in preparing for a hearing which he did not attend and took no steps to prepare for.

27. If he had applied his mind at all to the matter, he would have understood that the Respondent would incur these costs and would do so pointlessly, in respect of a claim which he was not pursuing.

28. That was unreasonable.

#### **Discretion**

29. I decided that it was appropriate to make an order for costs. The Claimant did not suggest why I should not. On the other hand, the Claimant's conduct in continuing with his claim was unreasonable, when he had been chased by the Respondent's solicitors on a number of occasions. He had many opportunities to confirm that he did not wish to pursue his claim, but failed to do so.
30. On 1 June 2023 the Respondent had offered that, if the Claimant withdrew his claim by 12 noon on Monday 5 June 2023, it would not pursue the Claimant for its costs associated with defending the claim to date. The Claimant failed even to respond to that entirely reasonable offer from the Respondent.
31. The Respondent had tried to limit its costs and to avoid a hearing and it was not appropriate for it to bear the costs of this.
32. I considered that the period for which the Respondent claimed costs was reasonable. The Respondent claimed its costs of preparing for the Final Hearing – and not any other costs of defending the claim, or attending hearings, when the Claimant was engaged with the proceedings.

**Amount of Costs**

33. I had no information about the Claimant's means.
34. The hourly rate charged by the Respondent's solicitor was relatively modest. The time spent, reflected in the amounts claimed in preparation, was also modest. Counsel's fee was also relatively low. I considered that all the costs claimed in respect of solicitors' and counsel's fees were modest and reasonable.
35. I did not order that the Claimant pay the costs of VAT. It was not clear to me on what basis VAT was claimed and charged.
36. Overall, I considered that a total order for costs against the Claimant of £4,470 was appropriate. He was significantly at fault in failing to withdraw his claim while not engaging with it, thereby ensuring that the Respondent incurred costs pointlessly.

\_\_\_\_\_ 5 July 2023 \_\_\_\_\_

Employment Judge Brown

SENT TO THE PARTIES ON

06/07/2023

FOR THE TRIBUNAL OFFICE