



EMPLOYMENT TRIBUNALS

Claimant

(1) Mr Sanjay Gohil;
(2) Mr Robert Keatings; and
(3) Others

v

Respondent

Weetabix Limited

Heard at: Huntingdon

On: 14 June 2023

Before: Employment Judge M Ord

Appearances

For the Claimants: Mr M Todd, Counsel

For the Respondent: Dr M Sharpe, Counsel

JUDGMENT on COSTS APPLICATION

No Order is made on the Respondent's Application for Costs.

REASONS

1. This matter comes before me today to hear the Respondent's Application for Costs.
2. I have heard evidence from Mr Keeper, Solicitor for the Respondent, Ms Laing who is now the Solicitor for the Claimants and I have seen Witness Statements from Mr Keatings and Mr Gohil. Reference has been made to a bundle of documents.
3. The Claimants withdrew their claims on 10 February 2023 with a request that no Judgment be entered. That has been dealt with separately.

4. The Respondent made an Application for Costs on 16 February 2023. That Application was under Rules 51, Rule 76(1)(a) and Rule 76(2).
5. There was, at that time, no Application for a Wasted Costs Order under Rule 80, but that was made in the face of the Tribunal today and I was also invited to consider making a Wasted Costs Order of my own motion.
6. The history of this case is long and to a degree unfortunate. The key dates are as follows:
 - 6.1 The claims were presented to the Tribunal on: 2 July 2021, Mr Keatings and 20 others; and 30 July 2021, Mr Gohil. Subsequently, an Order was made for the cases to be heard together. The claims relate to alleged lost 'rest days', a request to work or a requirement to work additional hours and not being correctly paid, all attributable according to the Claim Form to a change in shift pattern in January / February 2021.
 - 6.2 On 4 November 2021, the Respondent submitted a Response to the claim brought by Mr Gohil and on 15 November 2021 to the claim brought by Keatings and Others. In their Responses the Respondents indicated that they would seek further and better particulars from the Claimants.
 - 6.3 A request for further and better particulars was made on 10 December 2021, requiring a reply by 23 December 2021.
 - 6.4 On 23 December 2021, the Claimants requested and were granted an extension of time to 21 January 2022.
 - 6.5 On 19 January 2022, the Claimants requested and obtained an extension to 4 February 2022.
 - 6.6 No particulars were received on 7 February 2022 and 10 February 2022 the Respondent wrote to the Claimants asking for progress.
 - 6.7 On 11 February 2022, the Claimants asked for further time, not specified.
 - 6.8 On 15 and 25 February 2022, the Respondents again chased the Claimants and on 9 March 2022 the Claimants said they would provide the information 'as soon as possible'.
 - 6.9 On 14 March 2022, the Claimants requested an extension to 21 March 2022.
 - 6.10 The Tribunal had already issued an Order for Schedules of Loss to be provided by 15 March 2022 and in fact, on that date the Claimants provided further and better particulars and Schedules of Loss to the Respondent for 18 of the 22 Claimants.
 - 6.11 The Respondent says the further and better particulars were inadequate and that the Schedules of Loss amounted to an expansion of the claim.

- 6.12 On the same day, 15 March 2022, the Claimants made an Application to Amend the claim to allow new claims for unlawful deductions from wages prior to January and February 2021, going as far back as July 2019.
- 6.13 Three further Schedules of Loss were provided on 17 March 2022. One Claimant was previously on long term sickness from the Respondent and under Medical Retirement and the Claimants' Representatives were having difficulties obtaining instructions.
- 6.14 On 22 March 2022, the Respondent requested that the Final Hearing which had been listed for 24 May 2022, be converted to a Preliminary Hearing. As well as the need to consider the Amendment Application, the Respondent considered a one day time estimate to be inadequate for the Final Hearing.
- 6.15 On 17 May 2022, the Respondent's objections to the Claimant's Application was set out in writing.
- 6.16 On 23 May 2022, the Hearing was not effective as the Respondent confirmed that it wished to pursue an argument that the claims were out of time. I considered it appropriate to deal with that Application rather than to deal with an Application to Amend a claim which might be out of time and both Counsel agreed that the matter should be re-listed to another date, where both matters could be considered.
- 6.17 I emphasise that at that Hearing no Application from the Respondent to Strike Out the claims for being out of time was before the Tribunal and it was not suggested to me that the parties were ready to deal with the point on that day.
- 6.18 The matter was re-listed for 13 October 2022 and unfortunately that Hearing had to be postponed at short notice. The matter was, by consent, reserved to me and I suffered a family bereavement two days earlier. It was re-listed for 15 February 2023.
- 6.19 On 22 September 2022, the Claimants asked the Respondent to confirm their attitude if the Claimants withdrew their claims.
- 6.20 The Respondents did not reply to this request until 6 February 2023, stating that in those circumstances an Application for Costs would be made. They required a reply to understand the Claimants' intentions by 8 February 2023.
- 6.21 On 10 February 2023, the Claimants made an Application to Withdraw their claims without Judgment being entered to enable them to pursue the matters elsewhere.
- 6.22 On that basis I postponed the Hearing on 15 February 2023 to give the Respondents time to respond to the Claimants' Application and the matter was re-listed for today to deal with that matter and the Respondent's Application for Costs that was subsequently made.

7. I should also add that the Respondent has identified two failures by the Claimants to comply with the Orders of the Tribunal:
 - 7.1 The first was a failure to comply with the Order I made of 24 May 2022 to provide further and better particulars by 22 July 2022. 18 sets of particulars were provided that day, three more four days later and one not at all; that relating to Mr Mayes who clearly the Claimants Representatives are having difficulty in obtaining information from him due to illness.
 - 7.2 The second event was that the Claimants Withdrawal Application was not, contrary to Rule 90, copied to the Respondent's Solicitors. The Claimants' Solicitors have described this as an oversight; the email suggests that it had been sent to all relevant parties and it was rectified promptly once the matter was drawn to the attention of the Claimants' Solicitors.
8. In support of their Costs Application, the Respondent effectively complains about the following:
 - 8.1 First delay;
 - 8.2 Second, the proposed expansion of the claim;
 - 8.3 Third, the fact that this proposed expansion must in their view have been known for some considerable time before the further and better particulars or Schedules of Loss were provided; and
 - 8.4 Fourth, breaches of the Case Management Orders as set out above.
9. They also seek to attribute these to the Claimants' Representatives in support of their Wasted Costs Application.
10. The Respondent was content to wait until 4 February 2022 for the particulars they requested on 10 December 2021. They had made their request for information two weeks before the Christmas holidays and required a reply within 13 days.
11. Extensions of time were sought and given.
12. I emphasise that throughout this period the Respondent was asking the Claimants to voluntarily provide further information. No request to the Tribunal for an Order for particulars was ever made.
13. After 4 February 2022 when the particulars were not forthcoming, the Respondents chased the information. They did not say they were suffering any costs or prejudice, or would seek costs if the information was not provided and even then they did not seek any Order for the delivery of particulars from the Tribunal.

14. Particulars were provided, albeit not to the Respondent's satisfaction, on 15 March 2022, 39 days after the last agreed extension of time. On the same day the Claimants made Application to Amend. The Schedules of Loss were due the same day; 18 of them were provided, four were not, three were provided on 17 March 2022. As I have said, Mr Mayes' Schedule of Loss remains outstanding.
15. Delays since 15 March 2022 were the result of the following:
 - 15.1 First, the Respondent seeking to pursue without Application the issue of time on 24 May 2022, necessitating the postponement of that Hearing;
 - 15.2 Second, the postponement of the Hearing on 13 October 2022, which was to deal with the issues of time and amendment as a result of my own availability; and
 - 15.3 Third, the delay in the Respondent replying to the Claimant's request of September 2022 until February 2023, regarding possible withdrawal of the claims.
16. Once the Respondent's position was clarified, the Claimants promptly sought to withdraw the claim and the remaining issues which were to be heard by me.
17. The two breaches of the Case Management Orders are minor. They do not justify any Costs Award under Rule 76(2). Each of them is but a few days in length. One of them by oversight and one of them in relation to the delivery of particulars.
18. The overall conduct of this case has not, in my view, been unreasonable. The Claimants' Representatives were managing a complaint from 22 Claimants. They were working in relation to particulars to timescales imposed by the Respondent and the Respondent did not at any stage consider it worthwhile seeking judicial intervention if their request for information had become, as they said in correspondence, urgent.
19. Further, I do not accept the criticism of the Claimants that they should have made an Application to Amend earlier, or that they should have withdrawn the proceedings earlier. Whilst the Respondent categorises the Amendment or the proposed Amendment as an expansion of the case, that is true of many, if not most, contested Applications to Amend claims. Once all the information was within the Claimants' Representatives' possession, on or about 3 February 2022 (for most Claimants), that information having being received via the Claimants' Trade Union, they acted promptly to complete and serve the further and better particulars and the Schedules of Loss.

20. The Claimants sought from the Respondent their approach if the Claimants were to withdraw proceedings and received no answer for five months. Once the answer was received they acted promptly.
21. I do not consider the Claimants to have conducted these proceedings unreasonably.
22. Contrary to the Respondent's submissions, this was not a late withdrawal of claims. I was referred to the case of McPherson v BNP Paribas [2004] ICR 1398. The matters of amendment and time were outstanding and whilst disclosure had taken place, no final Hearing was in place, Witness Statements had not been exchanged and the time estimate remained at large.
23. As to any Order under Rule 80, I have referred myself to the Court of Appeal Judgment in Ridehalgh v Horsefield [1994] 3 All ER 848. The Court of Appeal there stating that,

"Only when, with all allowances made, a Lawyers conduct of proceedings is quite plainly unjustifiable that it can be appropriate to make a Wasted Costs Order."
24. On the information before me, reflecting as I do on the difficulty regarding Solicitor and own client privilege which attaches to many aspects of the conduct of the case, does not approach that level of culpability.
25. An Order under Rule 80 requires me to be satisfied that the Claimants were guilty of improper, unreasonable or negligent acts as a result of which the other party has suffered costs. The Respondent has not satisfied me either of that level of behaviour by the Claimants' Representatives.
26. For those reasons the Application for Costs is refused and no Order is made on that Application.

9 August 2023

Employment Judge M Ord

Sent to the parties on: 21 August 2023

For the Tribunal Office