



EMPLOYMENT TRIBUNALS

Claimant: Mr J Price

Respondent: 1. Creations Hair and Barbering Studio
2. Creations Hairdressers & Barbering Studio Ltd.
3. White Label Cosmetics Ltd.

Heard at: Manchester Employment
Tribunal

On: 7 September 2023
(in Chambers)

Before: Employment Judge McDonald

REPRESENTATION:

Claimant: Not in attendance

Respondent: Not in attendance

JUDGMENT ON A COSTS APPLICATION

The judgment of the Tribunal is that:

1. The second respondent's application for a costs order against the claimant succeeds.
2. The claimant is ordered to pay the second respondent's costs of £2907 plus VAT, a total amount of £3488.40

REASONS

The background to the costs application

1. In a claim form presented on 5 July 2022, the claimant complained of unfair dismissal, breach of contract, victimisation, harassment related to disability and various forms of disability discrimination. As is standard practice in discrimination cases, the Tribunal listed a Preliminary Hearing for Case Management ("the CMPH"). The respondents filed a response denying the claims.

2. The CMPH was on 2 December 2022. The respondents were represented by Mr Robinson, a solicitor from Hodge Halsall. The claimant did not attend and was not represented at that hearing. Because of that, Employment Judge Horne issued a strike out warning.

3. That warning was set out in the Case Management Order (“the CMO”) which Employment Judge Horne made at the CMPH. It said that the Tribunal was considering striking out the claimant’s case under rule 37 of the Employment Tribunal Rules 2013 (“the ET Rules”) because the history of the case tended to suggest that the claimant was not pursuing his claim actively and/or was conducting it unreasonably.

4. The claimant was given 14 days from the date when the CMO was sent to the parties to make representations in writing as to why his claim should not be struck out and/or to ask that the question of striking out be decided at a hearing.

5. The CMO was sent to the parties on 9 December 2022. The claimant did not respond at all. He has not responded to any correspondence from the Tribunal since he issued his claim.

6. By a judgment given on 25 January 2023 I struck out the claimant’s claim on the grounds that it had not been actively pursued and/or that the claimant had conducted his case unreasonably.

7. The claimant brought his claim against the 3 named respondents. The second respondent accepts it was the claimant’s employer. On 13 March 2023 Hodge Halsall applied for a costs order in favour of the second respondent on the grounds that the claimant had acted vexatiously or otherwise unreasonably in the conduct of proceedings. The application is for an order that the claimant pay the second respondent’s legal costs of £2907 plus VAT, a total amount of £3488.40. The second respondent consented to the application being dealt with on the papers without a hearing.

8. The Tribunal wrote to the claimant on 5 April 2023. It directed that the claimant provide his comments on the costs application by 14 April 2023. The letter said that if the claimant did not request a hearing, the matter would be dealt with on the papers. The claimant did not respond.

9. I considered the application in chambers on 7 September 2023.

The Relevant Law

10. The power to award costs is contained in the 2013 Rules of Procedure. The definition of costs appears in rule 74(1) and includes fees, charges, disbursements or expenses incurred by or on behalf of the receiving party.

11. Rule 75(1) provides that a Costs Order includes an order that a party makes a payment to another party “in respect of the costs that the receiving party has incurred while legally represented”.

12. The circumstances in which a Costs Order may be made are set out in rule 76. The relevant provision here was rule 76(1) which provides as follows:

“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.”**

13. The procedure by which the costs application should be considered is set out in rule 77 and the amount which the Tribunal may award is governed by rule 78. In summary rule 78 empowers a Tribunal to make an order in respect of a specified amount not exceeding £20,000, or alternatively to order the paying party to pay the whole or specified part of the costs with the amount to be determined following a detailed assessment.

14. Rule 84 concerns ability to pay and reads as follows:

“In deciding whether to make a costs, preparation time or wasted costs order and if so in what amount, the Tribunal may have regard to the paying party’s (or where a wasted costs order is made the representative’s) ability to pay.”

15. It follows from these rules as to costs that the Tribunal must go through a three stage procedure (see paragraph 25 of **Haydar v Pennine Acute NHS Trust UKEAT 0141/17/BA**). The first stage is to decide whether the power to award costs has arisen, whether by way of unreasonable conduct or otherwise under rule 76; if so, the second stage is to decide whether to make an award, and if so the third stage is to decide how much to award. Ability to pay may be taken into account at the second and/or third stage.

16. The case law on the costs powers (and their predecessors in the 2004 Rules of Procedure) include confirmation that the award of costs is the exception rather than the rule in Employment Tribunal proceedings; that was acknowledged in **Gee v Shell UK Limited [2003] IRLR 82**.

17. An award of costs is compensatory and not punitive so there should be an examination of what loss has been incurred by the receiving party.

18. “Vexatious” was defined by Lord Bingham in **Attorney General v Barker [2000] 1 FLR 759** and cited with approval by the Court of Appeal in **Scott v Russell [2013] EWCA Civ 1432** in relation to costs awarded by a Tribunal:

“The hallmark of vexatious proceedings is...that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceedings may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant...”

19. In determining whether to make an order on the ground that a party has conducted proceedings unreasonably, a Tribunal should take into account the ‘nature, gravity and effect’ of a party’s unreasonable conduct — **McPherson v BNP Paribas (London Branch) 2004 ICR 1398, CA**. However, this does not mean that the circumstances of a case have to be separated into sections such as ‘nature’, ‘gravity’ and ‘effect’, with each section being analysed separately. The vital point in

exercising the discretion to order costs is to look at the whole picture. The Tribunal has to ask whether there has been unreasonable conduct by the paying party in bringing, defending or conducting the case and, in doing so, identify the conduct, what was unreasonable about it, and what effect it had. This process does not entail a detailed or minute assessment. Instead the Tribunal should adopt a broad-brush approach, against the background of all the relevant circumstances: **Yerrakalva v Barnsley Metropolitan Borough Council and anor 2012 ICR 420, CA**.

20. In assessing the conduct of a party, it is 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. An employment tribunal cannot, and should not, judge a litigant in person by the standards of a professional representative: **AQ Ltd v Holden 2012 IRLR 648, EAT**. That does not mean that lay people are immune from orders for costs: a litigant in person can be found to have behaved vexatiously or unreasonably even when proper allowance is made for their inexperience and lack of objectivity.

21. It is not unreasonable conduct per se for a claimant to withdraw a claim before it proceeds to a final hearing: **McPherson v BNP Paribas**. The critical question is whether the claimant withdrawing the claim has conducted the proceedings unreasonably, not whether the withdrawal of the claim is in itself unreasonable. The same applies where there is a late withdrawal of a claim. It is not necessarily unreasonable conduct to withdraw a claim at a late stage in proceedings.

Discussion and conclusions

22. The second respondent's application for costs as set out in Hodge Halsall's letter of 13 March 2023 was based on the grounds that the respondent had acted vexatiously or otherwise unreasonably in conducting the proceedings. (rule 76(1)(a)). The application does not say that the claimant had acted vexatiously or unreasonably in bringing proceedings. I note, however, that the claimant had not been employed by the second respondent for the 2 years usually needed to bring a claim of unfair dismissal. His claim form does not refer to any circumstances which would have made his dismissal automatically unfair. In those circumstances, it seems to me that unfair dismissal claim was fundamentally flawed.

23. The second respondent in its response filed on 12 August 2022 did not accept the claimant was a disabled person; denied disability discrimination; and said his dismissal was fair. However, it did accept that it employed and dismissed the claimant; that he told them about suffering from cluster headaches for which he received medication; and that the notification to the claimant on 12 April 2022 that his employment was to be terminated had "not been in line with its procedures". It said the dismissal was nonetheless fair because it had written to the claimant on 14 April 2022 to confirm he was suspended pending investigation. It had then carried out a disciplinary process resulting in the claimant's dismissal for gross misconduct on 17 May 2022. It did not refer to the lack of sufficient length of service to bring a claim of unfair dismissal.

24. Other than filing his claim, the claimant did not contact the Tribunal or the respondents at any point in relation to the proceedings. The only communication from him or on his behalf was on 1 December 2022, the day before the CMPH. That was from Ms Brain, a Trainee Solicitor at Stephenson's. The claimant had named her

as his representative on his claim form. The email of 1 December said that Ms Brain was not acting on behalf of the Claimant and that all future correspondence should be sent to the Claimant directly. It does not make clear whether that meant Stephenson's had never been acting for the claimant or had been but were no longer. On balance I find it was the former.

25. After filing his claim form the Claimant has not participated in the proceedings at all. He did not attend the CMPH, giving no reason for non-attendance. He did not comply with the case management orders in the CMO and did not respond to the strike out warning in Employment Judge Horne's CMO. He has at no point contacted the Tribunal to indicate that he was withdrawing his claim. He has not responded to any communications about this strike out warning.

26. Based on the claimant's complete lack of engagement since lodging his claim, and in the absence of any submission from him to the contrary, I find no indication that the claimant ever intended to pursue his claim beyond lodging it. Given that, I find that it was unreasonable conduct on his part not to withdraw his claim at the earliest possible opportunity and before the second respondent had incurred the costs of responding to his claim. I do not find his conduct of the claim was vexatious. Although I find that the unfair dismissal claim was bound to fail, the disability discrimination claim was not one with no discernible basis in law.

27. I have decided that the claimant did act unreasonably in the way he conducted proceedings. That means the power to award costs has arisen. The next question is whether the costs order should be made. I have decided that it should. The claimant's failure to withdraw his claim meant that the respondent had no alternative but to incur costs in defending the claim until it was struck out. That included preparing and filing a comprehensive Response; preparing and attending the CMPH; and corresponding with the Tribunal about the case. I am not in a position to consider the claimant's ability to pay because he has not provided any information about his current or future employment prospects and financial means.

28. When it comes to the amount to be awarded, I have considered the Schedule of Costs and the chronological, itemised list of costs incurred provided by the second respondent on 31 July 2023 in response to my direction of 20 July 2023. Those documents show that the work in this case was undertaken by Mr Robinson, a solicitor with over 20 years' post qualification experience. I find the hourly rate of £255 plus VAT for his costs to be reasonable and in line with the guideline hourly rates applicable in cases for summary assessment of court costs. I find the amount claimed in terms of the time spent by Mr Robinson to be reasonable given the nature of the claims brought, the comprehensive nature of the Response filed and the need to prepare and attend the CMPH.

29. I considered whether I should award the whole amount claimed given that the application does not suggest that the claimant acted unreasonably in bringing proceedings. I considered whether the costs involved in preparing the Response would have been incurred in any event and were not attributable to the claimant's unreasonable conduct. Given my finding that the claimant had no intention of pursuing his claim beyond lodging it, I have decided it is appropriate to award the whole of the costs being claimed by the second respondent.

Conclusion

30. For the reasons set out above, the second respondent's application that the claimant pay its costs of £3488.10 succeeds.

Employment Judge McDonald

Date: 5 October 2023

JUDGMENT AND REASONS SENT TO THE PARTIES ON
13 October 2023

FOR THE TRIBUNAL OFFICE

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