



EMPLOYMENT TRIBUNALS

Claimant
Mr Z Khan

Respondent
Mibelle Ltd

Heard at: Leeds Employment Tribunal **On: 13 October 2023**
In chambers

Before: Employment Judge Davies
Ms S Scott
Mr K Smith

JUDGMENT

1. Pursuant to Employment Tribunal Rule 76, the Claimant shall pay the Respondent **£5,000** in respect of the Respondent's costs.

REASONS

Introduction

1. This judgment should be read together with the Tribunal's judgment on liability dated 30 March 2023 and its written reasons dated 4 May 2023.
2. The Respondent made an application for its costs. The parties were asked whether they wanted that to be dealt with at a hearing or on the papers. The Claimant appeared to say that he wanted to attend a hearing and a hearing was listed. By error, the notice of hearing suggested that the parties did not need to attend. The hearing was adjourned, to ensure that if the Claimant wanted to attend, he could do so. The Claimant was then asked to confirm whether or not he wanted to attend a costs hearing and was told that if he did not respond the matter would be dealt with on the papers. He did not respond. The Tribunal panel therefore convened in chambers to deal with the application on the papers.
3. In determining the application, the Tribunal considered the Respondent's application dated 19 April 2023 and the Claimant's response of the same date; the Respondent's letter dated 11 May 2023 and the Claimant's response of the same date; and the Claimant's email of 4 July 2023.
4. The Claimant's position was relatively brief. He said that he was not in a position to pay the sum sought by the Respondent. He does not have a job and does not have property or savings. He said that his "only mistake" was not getting legal representation and that his claim had been legitimate. He disagreed with the Respondent's account of a conversation after the Tribunal hearing. He suggested that he had lost his Tribunal claim mainly for "procedural" reasons. He mentioned that he had suffered a bereavement during the preparation for the hearing.

Legal principles

5. 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
- (b) any claim or response had no reasonable prospect of success.

...

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.

6. The Tribunal had regard to principles derived from some of the cases, in particular:
- 6.1.1. Litigants in person 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.
 - 6.1.2. 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.
 - 6.1.3. The mere fact that a party has lied in the course of its evidence is not necessarily sufficient to found an award of costs. The Tribunal has to have regard to the context, and the nature, gravity and effect of the untruthful evidence in determining the question of unreasonableness: see *Arrowsmith v Nottingham Trent University* [2012] ICR 159 CA.

Findings of fact

7. The Claimant's explanation for his failure to comply with the Tribunal's orders, leading to the postponement of the Tribunal hearing in January 2023 was related to the death of his grandfather and his own mental health. The Tribunal took that explanation at face value at the time and we have not treated the Claimant's failure to comply with case management orders at that stage as unreasonable conduct for the purposes of a costs application.
8. Following that postponement there was further non-compliance with Tribunal orders. Some of it was understandable: the Claimant did not have legal representation and was obviously struggling with his mental health at times. However, other aspects of his conduct were unreasonable. He repeatedly failed to copy the Respondent into correspondence with the Tribunal, despite being clearly told he must do so. He failed to arrange for his witnesses to attend the Tribunal hearing, when it had been made clear that they needed to do so. However, these matters did not lead to any significant costs being incurred.
9. The Tribunal referred at paragraphs 4 to 6 of its written reasons to the Claimant's conduct in relation to the exchange of witness statements. As set out there, we found that he deliberately lied to the Respondent's legal representative and that he did so in

order dishonestly to obtain an advantage in relation to the exchange of witness statements. He attempted to have the response struck out on the basis of those events. That was unreasonable conduct and caused the Respondent some costs.

10. The Respondent referred in its application to a conversation that took place after the Tribunal hearing and provided evidence about that. The Claimant disputed the Respondent's version of events. The Tribunal did not reach any conclusion about that conversation. Similarly, the Respondent relied on allegations of unreasonable conduct towards its legal representative during the conduct of these proceedings, but detailed evidence was not provided. Again, the Tribunal did not reach conclusions about these matters.
11. The Tribunal found that the Claimant's conduct in redacting the text message referred to paragraphs 7 and 38 of the reasons was unreasonable. It was an attempt to conceal relevant evidence that cast the Claimant in a negative light. However, when ordered to disclose an unredacted copy of the message, the Claimant did so. His conduct caused modest costs because the Respondent had to make an application for specific disclosure.
12. The Claimant provided no documentary evidence about his means. He said in his correspondence that he does not have a job, although he did have some work for a period after his employment with the Respondent ended. He said that he does not have property or savings. The Tribunal approached this application on the basis that the Claimant does not own property or have savings. We find that he is not currently working but that there is no reason he should not obtain new work in HR in the near future. His financial position will improve when he does.

Conclusions

13. As set out in the findings of fact above, there were elements of the Claimant's conduct of the proceedings in the preparation for the hearing that were unreasonable. There were other elements on which the Respondent relied but about which the Tribunal was not in a position to make findings. We decided that it was not appropriate to exercise our discretion to make an order for costs in respect of any of those matters, with the exception of the Claimant's conduct in relation to the exchange of witness statements.
14. However, there was one further respect in which the Tribunal concluded that the Claimant acted unreasonably and that was by giving dishonest evidence about the central aspect of his complaint – whether or not he resigned on 13 April 2022. The Tribunal's reasons for concluding that he did resign are set out at paragraphs 32 to 39 of the written reasons. We record that we considered that the Claimant deliberately lied about what had happened on 13 April 2022. His account did not make sense and did not fit with the documents and other evidence from the time. It seemed to the Tribunal that he resigned in the heat of the moment and then, rather than retract his resignation as he was advised to do and had the opportunity to do, he lied about what had happened. He did so at the time, and then based his Tribunal claim on that dishonesty. His evidence to the Tribunal about it was dishonest. That was the foundation of the Tribunal claim. The Tribunal found that that was unreasonable conduct of the proceedings. We noted that the Claimant was not legally represented, but he must have known he was advancing a fundamentally dishonest account and his lack of legal representation does not make that reasonable. The consequence of that unreasonable conduct was that the Respondent was put to the expense of defending the entire claim and witnesses faced very serious allegations of discrimination, which they had to address.

15. The Tribunal concluded that it was appropriate to exercise our discretion to make an award of costs as a result of that unreasonable conduct. The Claimant's conduct in relation to the exchange of witness statements added weight to that conclusion. The Tribunal considered that the Claimant's ability to pay could be taken into account when deciding how much to order him to pay, but did not mean that no order should be made at all.
16. The Respondent seeks costs of £17,850 plus VAT, which it says represent part of its legal costs only. The Tribunal did not see a detailed costs bill. However, given our knowledge and experience of solicitors' hourly rates and counsels' fees in Tribunal proceedings, we are satisfied that legal costs of that amount have been reasonably incurred in defending this claim.
17. The Tribunal finally considered how much the Claimant should be ordered to pay. Here, we took what we know about his ability to pay into account. We proceeded on the basis that he does not have property or savings and is not currently working. However, we also considered that he has experience in HR work. He has had some short-term work since his employment with the Respondent ended and he is likely to obtain work again. When he does his financial position will improve. The Tribunal decided not to order the Claimant to pay the full sum claimed. That is an amount that he is unlikely to be able to pay for a number of years. We concluded that it was preferable to order the payment of part of the sum claimed, which he is likely to be able to pay in a reasonable timeframe. We decided that £5000 was the appropriate sum.

**Employment Judge Davies
24 October 2023**