



EMPLOYMENT TRIBUNALS

Claimant: Mr L Maclean
Respondent: Rob Wyman Homes Limited
On: 26 October 2023 (in chambers)
Before: Employment Judge S Jenkins

JUDGMENT

The Claimant's application for a costs order is refused.

REASONS

Background

1. The Claimant brought claims of constructive unfair dismissal, unauthorised deductions from wages, for payment in respect of accrued but untaken holiday, and of failure to provide payslips. The claim form was submitted on 7 June 2023, by the Claimant in person.
2. The claim was processed by the Tribunal on 27 June 2023 and, as is typical when such claims are brought, it was given an automatic two-day listing, with the hearing scheduled to take place by video on 9 and 10 November 2023. The notice of hearing contained standard directions which, relevantly, for this judgment, required the parties to disclose documents to each other on 22 August 2023, for the parties to agree the documents to be included in the hearing bundle by 5 September 2023 and for the Respondent to send a hard copy of the bundle to the Claimant by that date. Witness statements were then to be exchanged on 19 September 2023.
3. The Respondent was required to submit its response by 25 July 2023. On 24 July 2023, the Respondent, which throughout has been unrepresented, applied to the Tribunal for an extension of time to submit its response to 1 August 2023, due to delays it referred to in mail having been forwarded following a change in its registered office. That application was not copied to the Claimant, and neither was the Tribunal's response, later the same day, granting the extension of time to 1 August 2023. The response was then submitted on 1 August 2023 and was accepted and processed by the tribunal on 11 August 2023.

4. On 21 August 2023, the Respondent wrote to the Tribunal, again not copying in the Claimant, noting that they would submit their disclosure to the Claimant by 29 August 2023. They asked for confirmation of that, and of future dates for submissions. That email was not processed by the Tribunal at that time.
5. On 22 August 2023, the Claimant emailed the Tribunal, noting that he had submitted his disclosure to the Respondent by hand. He then wrote again to the Tribunal, on 24 August 2023, noting that he was a litigant in person and was being practically supported by his mother. He commented that he felt "*very isolated and disadvantaged*" in the proceedings owing to the Respondent's conduct. He sought a strike-out order or an unless order due to the Respondent's failures. He also asked for an extension of the next deadline, of 5 September 2023.
6. That email led Employment Judge Povey to direct that an urgent case management preliminary hearing should be listed to review progress and to ensure that the claims would be ready for final hearing on 9 and 10 November 2023. The notice of that hearing was then sent to the parties on 29 August 2023, with the hearing being listed for 8 September 2023.
7. In the meantime, the Tribunal sent an email to the parties, on 25 August 2023, addressing the Claimant's concern that he had not seen correspondence relating to the extension of time for the submission of the Respondent's response, and reminding the parties that Rule 92 of the Employment Tribunals Rules of Procedure requires parties to send copies of their communications with the Tribunal to the other party. The parties were also directed to confirm that they had now exchanged their documents, with the response required by 1 September 2023.
8. The Claimant reply to that email later the same day, saying, "*Received and understood*". He then sent further emails, on 26 August 2023 and 1 September 2023, noting that no documentation had been received from the Respondent. The Claimant also sent a further email to the Tribunal on 29 August 2023, pointing out his concerns over the Respondent's rationale for its request for an extension of time for submission of its response due to delays in the forwarding of email. I directed, on 1 September 2023, that all outstanding issues would be discussed at the hearing on 8 September 2023.
9. The Respondent then sent an email to the Tribunal, on 2 September 2023 at 12:10am, confirming that it had delivered its file of documents to the Claimant.
10. The Claimant submitted his preliminary hearing agenda and schedule of loss to the Tribunal on 4 and 5 September 2023, and an email was then sent to the Tribunal, on 7 September 2023, from solicitors noting that they had been instructed to act on the Claimant's behalf and to attend the hearing on 8 September 2023. The Respondent submitted its agenda on 8 September 2023 at 7:22am.
11. The preliminary hearing then proceeded as scheduled before Employment Judge Povey. He reset the directions, noting; that the parties must agree

which documents were going to be used at the hearing by 29 September 2023, that the Respondent must send a hard copy of the hearing bundle to the Claimant by 10 October 2023, and that witness statements were to be exchanged on 24th of October 2023.

12. Judge Povey also noted that the Claimant's solicitor had indicated that the Claimant was considering an application for costs in respect of the 8 September 2023 hearing, noting that it was asserted that the hearing arose because of the Respondent's failure to comply with the original directions. In relation to that, he ordered the Claimant to submit any costs application by 22 September 2023, and the Respondent to send any response to any such application by 6 October 2023. He then noted that, by consent, the Tribunal would determine any such application without a hearing, having regard to the submissions received.
13. The Claimant's representative submitted an application for costs on 22 September 2023, noting that it was made on the ground of what was asserted to have been unreasonable conduct by the Respondent and to have been breaches of the Tribunal's case management orders. The Claimant sought an order covering the costs incurred in the preparation for, and attendance at, the hearing on 8 September 2023, which were put at £1,550.52 inclusive of VAT. The Respondent provided its submissions in response on 6 October 2023.

Law

14. Rule 76 of the Employment Tribunals Rules of Procedure ("Rules") provides as follows:

"(1) A Tribunal may make a costs order..., and shall consider whether to do so, where it considers that-

(a) a party ... has acted ...unreasonably in ... the way that the proceedings... have been conducted...."

and

"(2) A Tribunal may also make such an order where a party has been in breach of any order or practice direction...."

15. Rule 77 provides that a party "*may apply for a costs order...at any stage up to 28 days after the date on which the judgment finally determining the proceedings in respect of that party was sent to the parties. No such order may be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application*".
16. Rule 78 then contains provisions dealing with the amount of a costs order.
17. The Employment Appeal Tribunal ("EAT"), in Hossaini v EDS Recruitment Ltd [2020] ICR 491, confirmed that considering a costs application involves a three-stage test: (i) Whether Rule 76(1) is engaged; (ii) If so, whether to award costs in the circumstances, that being at the discretion of the Tribunal; (iii) If so, how much to award.

18. The Court of Appeal reiterated, in Yerrakalva v Barnsley Metropolitan Borough Council and anor 2012 ICR 420, that costs in the employment tribunal are still the exception rather than the rule. It commented that the tribunal's power to order costs is more sparingly exercised and is more circumscribed than that of the ordinary courts, where the general rule is that costs follow the event and the unsuccessful litigant normally has to foot the legal bill for the litigation. In most cases the employment tribunal does not make any order for costs. If it does, it must act within rules that expressly confine the tribunal's power to specified circumstances, notably unreasonableness in the bringing or conduct of the proceedings.
19. The Court also noted that the vital point in exercising the discretion to order costs is to look at the whole picture and to ask whether there has been any unreasonable conduct by the paying party in conducting the case and, in doing so identify the conduct, what was unreasonable about it, and what effect it had.
20. I was also mindful of the guidance provided by the EAT in AQ Limited v Holden [2012] IRLR 648, that litigants in person are not to be judged the standards of a professional representative, and, in particular, that lay people are likely to lack the objectivity and knowledge of law and practice brought to bear by a professional legal adviser.

Conclusions

21. Applying the legal principles to the Claimant's application, I did not consider that it was appropriate to make a costs order. I noted that the Respondent had delayed in submitting its documents to the Claimant by just over a week. I further noted however, that that was in the context of the Respondent having sought an extension of the time for submission of its documents of a week, and that that had not been addressed by the Tribunal.
22. Although it was not clear why the Respondent needed an additional week to deal with its disclosure, it made a limited extension request, and then was late by a matter of days beyond the requested extension date. Whilst not condoning delays in complying with Tribunal orders, the delay was short, particularly in the context of the final hearing being over two months away.
23. I also noted that the Respondent has been representing itself, without legal representation, which provided some additional justification for concluding that the Respondent's conduct had not been unreasonable.
24. I also concluded that, even if I had been convinced that the first stage of the Hussaini test had been satisfied, i.e. that Rule 76(1) had been engaged, I would not have considered it appropriate to exercise my discretion to award costs. The matters to be addressed at the preliminary hearing on 8 September 2023, i.e. the compliance with the Tribunal's case management directions and the assessment of the readiness of the case for hearing, were relatively straightforward ones, which were readily able to be addressed by the Employment Judge without necessitating the involvement of a legal representative.

25. Overall therefore, I considered that the Claimant's application for a costs order should be refused.

Employment Judge S Jenkins
Date: 26 October 2023

JUDGMENT & REASONS SENT TO THE PARTIES ON 27 October 2023

FOR THE TRIBUNAL OFFICE Mr N Roche