



EMPLOYMENT TRIBUNALS

Claimant
Ms A Ali

Respondent
Petrie Tucker and Partners trading as
My Dentist

PRELIMINARY HEARING

Heard at: Leeds Employment Tribunal **On:** 15 November 2023
Before: Employment Judge Davies

JUDGMENT

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

REASONS

Introduction

1. A preliminary hearing in public on 15 November 2023 was listed by Employment Judge Deeley following the last-minute postponement of the final hearing of this matter, which was due to start that day and to last for eight days.
2. Employment Judge Deeley listed a preliminary hearing in public to consider whether any part of the claim or response should be struck out and whether any order for costs should be made.
3. Neither party made an application to strike out any part of the other side's case, and I did not pursue that of my own motion. However, the Respondent did make an application for costs associated with failures by the Claimant/the Claimant's representative to comply with case management orders, culminating in the last-minute postponement of the hearing.
4. Both sides had produced a file of relevant documents and I considered them.
5. These reasons reflect the oral judgment I gave on 15 November 2023. However, the Claimant was not present at the preliminary hearing and it is important that she understands why I have made this costs order, so I have set those reasons out in writing.

Legal principles

6. 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;
- (b) any claim or response had no reasonable prospect of success; or
- (c) a hearing has been postponed or adjourned on the application of a party made less than 7 days before the date on which the relevant hearing begins.

...

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.

7. I had regard to principles derived from the cases, in particular those set out by the Court of Appeal in *Yerrakalva v Barnsley MBC* [2012] ICR 420 CA and *Arrowsmith v Nottingham Trent University* [2012] ICR 159 CA. The Tribunal must decide whether one of the thresholds for making a costs order in Rule 76 is met. If it is, the Tribunal must separately exercise its discretion and decide whether to make a costs order. In considering whether to make an award of costs, the Tribunal must identify the unreasonable conduct, say what was unreasonable about it and say what its effect was.

Factual background

8. Based on the documentary material provided to me, the background to this costs application is as follows.
9. Employment Judge Flanagan conducted a preliminary hearing for case management and made case management orders on 22 June 2023. He ordered, among other things, the disclosure of documents by 17 August 2023, the preparation of a hearing file by 14 September 2023 and the exchange of witness statements by 19 October 2023. He listed the final hearing for eight days, to start today, 15 November 2023.
10. The Claimant provided substantially complete disclosure of a large number of documents by 17 August 2023. The disclosure included the transcript of an audio recording and the Claimant's representative said that the Claimant had done her best to transcribe it and would provide the audio recording if required. Her representative did not say, as he said today, that the Claimant had provided the audio recording to a third party transcriber for transcription.
11. The Respondent noted that one of the listed email chains was missing, and requested a copy on 21 August 2023. No response was received, so it emailed again on 25 August 2023. The Claimant's representative replied the same day to say that he was out of the office and would send the chain as soon as he was back in the office. He did not say that the Claimant was unwell, struggling or unable to find the chain. The email chain was still not provided. The Respondent made a further request on 30 August 2023 and another on 5 September 2023. At that stage, for the first time, it also requested a copy of the audio recording.

12. On 6 September 2023 the Respondent sent the Claimant a draft copy of the proposed hearing file, with a reminder to provide a copy of the missing email chain. It sent a further request for that email chain on 18 September 2023. The email chain was still not received. The Respondent made a further request on 17 October 2023. Apart from the email of 25 August 2023, I was not shown any other email from the Claimant's representative responding to the Respondent's requests, providing an explanation for any delay or any other information about the missing email chain, until 18 October 2023.
13. On 18 October 2023 the Claimant's representative sent a brief email providing the missing email chain. That was after almost two months and more than half a dozen requests from the Respondent. No explanation for the delay was provided.
14. On 18 October 2023 the Respondent requested a copy of the audio recording by the end of the week, failing which it would notify the Tribunal.
15. The date for exchanging witness statements was 19 October 2023. It was not addressed by either party at that stage – the context was that the Claimant had made an application for judicial mediation to be listed. That arose as follows. As indicated above, the 8-day hearing due to start on 15 November 2023 had been listed at a preliminary hearing in front of Employment Judge Flanagan. Notice of hearing was sent to the parties on 23 June 2023. On 7 September 2023 the Claimant was sent an NHS appointment in relation to her shoulder condition. It fell within the hearing window. No action was taken. On 25 September 2023, she was sent a second NHS appointment in relation to the condition, also falling within the hearing window. Again, no action was taken. On 17 October 2023, almost six weeks after the first letter and four weeks after the second, the Claimant's representative made an application for judicial mediation to be listed, because the Claimant's two medical appointments clashed with the 8-day listing.
16. Meanwhile, on 24 October 2023 the Respondent made an application to the Tribunal for specific disclosure of the audio recording. On 25 October 2023 the Claimant's representative emailed the Claimant at 10:30am asking her urgently to provide a copy. The Claimant did so by email at 12:19pm and the Claimant's representative sent it to the Respondent at 6:34pm. The Claimant's representative said today that the reason for the delay in sending the audio file was that the Claimant's device had changed, so she had to go back to the person who transcribed the audio file to obtain a copy from them. That explanation was not provided to the Respondent at any time, nor is it clear how it fits with those emails of 25 October 2023. In the email to the Respondent, the only explanation provided was, "The Claimant is going through a lot in this current time." Nor is it clear how it fits with the previous email, indicating that the Claimant had done her best to transcribe the audio recording.
17. The Claimant's application to list a judicial mediation instead of the final hearing was refused by the Tribunal in an email dated 3 November 2023. The Respondent's representative evidently telephoned the Tribunal on 2 November 2023 to find out what was happening about the application and was informed of the Judge's decision, although it had not yet been sent out. The Respondent's representative therefore emailed the Claimant on 2 November 2023 to say that he understood the application had been refused and written confirmation was shortly to be sent out. He said that they therefore needed to exchange witness statements. He suggested 4pm on 8 November 2023. The Claimant's representative responded to say that he had not heard from the Tribunal; that this related to the Claimant's wellbeing and ability to participate in the hearing; that he anticipated the Respondent's "co-operation" so that judicial mediation

could be offered; and that he “looked forward to a favourable response from the Tribunal”. He did not address the need to exchange witness statements.

18. The Tribunal’s written decision was sent out on 3 November 2023. The application was refused by Employment Judge Wade. She said that it was possible to conclude the hearing within the 8-day allocation, even allowing the Claimant to attend her appointments, and that it was not possible to list a judicial mediation, because it would have to be conducted on the first morning of the hearing by a different judge in those circumstances. She reminded the parties that they could contact ACAS.
19. The Claimant’s representative made a further application on 6 November 2023. He requested judicial mediation again. This time he said that the Claimant was unfit but he did not provide any medical evidence. He provided an email from the Claimant describing her condition and indicating that she would not be able to participate in the hearing. She indicated that she would be having a procedure on her shoulder on 17 November 2023 that would leave her in pain and unable to participate in the hearing.
20. The Respondent’s representative sent a further email about witness statements on 7 November 2023. He pointed out that the hearing was due to start in a week and that they needed to agree a date and time for exchange. The Claimant’s representative did not respond.
21. On Friday 10 November 2023, Employment Judge Shepherd refused the Claimant’s second application for judicial mediation. He said that it was substantially the same application that had already been refused. He added that if the Claimant was unfit, medical evidence must be provided. That decision was emailed to the parties at 9.50am. At 10:53am the Respondent chased the Claimant’s representative in relation to witness statements. They pointed out that the statements also needed to be filed with the Tribunal on Monday 13 November 2023. After 9pm on Friday 10 November 2023, the Claimant’s representative responded to say that he could not exchange statements on Monday because he was in the Tribunal. He proposed midday Tuesday 14 November 2023 instead. The Respondent’s representative replied at 10:49am on Monday 13 November 2023 to say that this was not agreed.
22. Employment Judge Flanagan had ordered a cast list, chronology and reading list to be agreed. The Respondent sent it to the Claimant’s representative for agreement on 8 November 2023. No response was received until 14 November 2023, after the hearing had been postponed.
23. The Claimant’s third application was made on Monday 13 November 2023. A fit note was attached that signed her off work for 4 weeks with her shoulder condition. It did not say anything about her fitness to participate in a Tribunal hearing or what the likely effect of the procedure she was due to undertake would be. The Respondent responded to this application. It referred to the Claimant’s failure to comply with case management orders and the proposed last-minute exchange of witness statements, and expressed concern that it would not have sufficient time to prepare for the hearing, or that the Claimant would not attend. In those circumstances it said that it did not object to the application.
24. Employment Judge Deeley ordered that the hearing should be postponed. She did so not on the grounds of the Claimant’s health, but because the parties were not properly prepared for the hearing.
25. I asked the Claimant’s representative what steps he had taken to prepare for the hearing, in particular to prepare the Claimant’s witness statement, in case her applications for judicial mediation/postponement were refused. He told me that the

Claimant was drafting her own statement, but that the Claimant's witness statement was done and that he was ready to exchange it. When I asked him why he had not addressed the exchange of witness statements with the Respondent's representative between 2 and 10 November 2023, he said, "Maybe I missed that, but I replied on 10 November." He also said, "I didn't respond. Maybe I was doing some other things."

Conclusions

26. I concluded that the conduct of the Claimant and/or her representative amounted to unreasonable conduct of the proceedings within the meaning of Rule 76, in the following respects:
 - 26.1. It was unreasonable not to respond to the Respondent's repeated emails about the missing email chain between 25 August 2023 and 18 October 2023.
 - 26.2. It was unreasonable not to respond to the Respondent's email of 5 September 2023 about the audio recording, nor to its email of 18 October 2023, leading to the Respondent making an application to the Tribunal as it had indicated it would. The audio recording was promptly provided as soon as that application was made.
 - 26.3. It was unreasonable not to make any application to the Tribunal nor to alert the Respondent to the issues arising from the Claimant's medical appointments for almost six weeks (from the first letter) and four weeks (from the second).
 - 26.4. It was unreasonable not to communicate with the Respondent between 2 November 2023 and the evening of Friday 10 November 2023 about agreeing a date for the exchange of witness statements. On 2 November 2023 there remained adequate time for two legally represented parties to exchange statements and prepare for the eight-day hearing. By 9pm on Friday 10 November 2023, and given that the Claimant's representative was saying at that stage that the exchange of witness statements could not take place before midday on the day before the hearing, there was no longer sufficient time.
 - 26.5. That led directly to the postponement of the hearing. Employment Judge Deeley did not postpone it on the grounds of the Claimant's ill health. The bare fit note provided by the Claimant did not address her fitness to attend the hearing. Fitness to work and fitness to attend a hearing are not the same.
 - 26.6. I consider that the conduct of the Claimant/her representative remains unreasonable, despite the fact that repeated applications for judicial mediation/postponement were made. The making of such applications does not absolve a party of its obligation to comply with the Tribunal's orders. It must continue to prepare on the basis that its application may not be successful. In any event, the Claimant's representative does not say that he was not in a position to exchange witness statements; he says that he was or would have been. It appears that he simply failed to communicate about that, focussing instead on making repeated applications to have the hearing changed or postponed.
 - 26.7. The Claimant's representative also points to the Claimant's ongoing ill health and says that he was struggling to obtain instructions from her; she frequently would not respond to him or return his calls; and he had to keep chasing her. Assuming that is correct and assuming it was caused by the Claimant's ill health, I consider that her representative's conduct remained unreasonable. What was unreasonable was his failure to communicate and co-operate with the

Respondent's representative, in accordance with the overriding objective. That applies to correspondence about the missing email chain and the audio recording, and to communicating about the exchange of witness statements, although I again note that the Claimant's representative said that her witness statement was ready to be exchanged.

27. The unreasonable conduct of the Claimant/her representative led to the Respondent incurring costs in having to send chasing correspondence and make an application to the Tribunal. It also led to the last-minute postponement of the hearing and the requirement to prepare for an attend today's additional preliminary hearing instead. Had a timely postponement application been made on health grounds supported by medical evidence, it is possible that the hearing would have been postponed, but that would have been done some weeks before the Tribunal hearing and without the need for this further preliminary hearing.
28. I have concluded that it is appropriate to make an order for costs against the Claimant in those circumstances. The unreasonable conduct was extensive and avoidable. It led directly to the Respondent incurring additional costs and it is consistent with the overriding objective to make an order for costs. The Claimant's ability to pay can be considered in relation to the amount of the award but does not prevent the making of an award at all.
29. The Respondent did not produce a schedule of costs. It confined its application to the costs of preparing for and attending the preliminary hearing, and modest costs associated with the correspondence and specific disclosure application. I was told that the costs of preparing for and attending the preliminary hearing were £1320 (3 hours' preparation time and three hours' attendance time, all at £220 per hour). The correspondence costs were not itemised. I noted that some of the correspondence was written by the PA to the partner and some by the partner. The costs will have reflected that. Most items of correspondence will have taken one or two units of time.
30. I did not consider it proportionate to order the preparation of a schedule of costs or more detailed information about the Respondent's costs. It is apparent that preparation for this hearing will have taken three hours, given that a file of relevant documents was assembled and provided and that the representative had prepared careful submissions in relation to the Respondent's costs application. The preliminary hearing was listed for three hours and lasted around two and a half, not including travel and waiting time. The quoted hourly rate is consistent with appropriate, local charging rates. I am entirely satisfied that costs of £1320 have therefore reasonably been incurred in association with this preliminary hearing. The Respondent's costs of preparing correspondence and its specific disclosure application would be likely to be around £300-£500.
31. The Claimant's representative had not produced any evidence in relation to her ability to pay a costs order. He told me that she had not obtained work since leaving the Respondent. I assumed for these purposes that she has modest means, but I also noted that she has engaged the services of Alpha Shindara Legal.
32. I decided that it was not appropriate to order the Claimant to pay the full sum claimed by the Respondent. Although I do not have any proper information about her means, I have assumed that they are modest given that she has not worked since leaving the Respondent. However, in my view it is appropriate to order her to make a significant contribution to the costs resulting from her/her representative's unreasonable conduct. I concluded that £1000 was the appropriate figure. That represents a significant contribution, but at a level that she is likely to be able to pay in a reasonable timeframe

Case Number: 1802152/2023

**Employment Judge Davies
17 November 2023**