EMPLOYMENT TRIBUNALS

Claimant: Mr M Clements

Respondents: Secretary of State for Justice and another

Heard at: Midlands West Tribunal via Cloud Video Platform

On: 6 December 2023

Before: Employment Judge Brewer

Representation
Claimant: Mr S Martins, Lay Representative
Respondent: Ms J Moore, Counsel

JUDGMENT

The Tribunal's judgment is that:

1. the first respondent's application for a costs order against the claimant succeeds,
2. the first respondent's application for wasted costs order against the claimant's representative fails, and
3. within 14 days of the date the judgment and reasons are sent to the parties the claimant shall pay to the respondent costs in the sum of £50,186.50.

REASONS

Introduction

1. This is an application for costs in respect of claims brought by the claimant in which he alleged breach of s. 44 Employment Rights Act 1996.

2. Following an open preliminary issue hearing before me held on 24 February 2023, and by my judgment dated 27 February 2023, I struck out the claimant's claims on a number of grounds: that they no reasonable prospect of success pursuant to Rule 37(1)(a) of the Tribunal's Rules of Procedure 2013 ("the Rules"), unreasonable conduct by or on behalf of the claimant pursuant to Rule 37(1)(b) of the Rules and/or non-compliance with the Rules or with Tribunal Orders pursuant ro Rule 37(1)(c) of the Rules.

3. On 19 May 2023, 27 days after receiving the written judgment the respondents submitted an application for a costs order to be made in accordance with Rule 76 of the Rules. In practise, the second respondent was not seeking costs as all of his costs were met by the first respondent. In this judgment therefore my references to "the respondent" are to the first respondent.

4. The costs application was, of course, copied to the claimant's representative, Mr Martins. He was asked for comments on the application.

5. Mr Martins wrote to the Tribunal on 24 May 2023 and his email included the following:

> "*This is the first time during the proceedings that costs has been raised an issue.*
>
> *Contrary to procedure, we should have been notified in writing prior to the risk of cost being sought, this was not advanced at any stage of the proceedings.*
>
> *Therefore my client has not had the opportunity to consider his position, neither has he had the benefit of receiving advice of the potential risk or otherwise of the claim failing."*

6. The respondent was taken somewhat by surprise by this assertion given that costs had been raised prior to the respondent's application. This gave rise to the possibility that Mr Martins had not or not properly advised his client and in those circumstances the respondent made an application for a wasted costs order against Mr Martins. However, when the new information on which that application was based arrived, the 28-day timeframe for the respondent to make an application for wasted costs had elapsed.

7. The Tribunal has a power under Rule 5 of the Rules to extend (or indeed shorten) any limit specified in the Rules, even if the time limit has already expired. Given the above I do extend time to enable the claim for costs against Mr Martins to be heard.

Issues

8. The issues are whether I should make a costs award against either the claimant and/or his representative Mr Martins.

Law

9. The Rules provide, as follows:

> *"76. (1) 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;* […]
>
> *(2) A Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party*…
>
> *77. A party may apply for a costs order or a preparation time 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."*

10. Rule 78 sets a maximum limit of £20,000 for costs ordered by way of summary assessment and provides for an uncapped award following a detailed assessment which may be carried out by an employment judge.

11. Rule 80 provides that the Tribunal may make a wasted costs order against a "*legal or other*" representative in the favour of any party where that party has incurred costs:

> *"(a) as a result of any improper, unreasonable or negligent act or omission on the part of the representative; or*
>
> *(b) which, in the light of any such act or omission occurring after they were incurred, the Tribunal considers it unreasonable to expect the receiving party to pay."*

12. Rule 84 provides that ability to pay may be taken into account when considering wasted costs orders.

13. In **FDA and ors v Bhardwaj** [2022] EAT 97 the EAT emphasised that there was no need, on a costs application, to cite extensively from authority. In most cases, the principles to be applied are apparent from the rules themselves, and costs decisions are decisions on their facts with no precedent value.

14. However, there should be a structured approach to dealing with an application for costs (as recently restated in **Hossaini v EDS [**2020] ICR 491) which essentially requires that a three-stage process is followed:

a. the Tribunal must determine whether or not its jurisdiction to make a costs award is engaged, if so,

b. the Tribunal must then consider the discretion afforded to it by the Rules and determine whether or not it considers it appropriate to make an award of costs in that case, if so only then should it turn to the third stage,

c. how much it should award.

15. The leading guidance for wasted costs is found in the judgment of the Court of Appeal in **Ridehalgh v Horsefield** [1994] Ch 205. Again, a three-stage test should be applied:

a. has the legal representative of whom complaint was made acted improperly, unreasonably or negligently,

b. if so, did such conduct cause the applicant to incur unnecessary costs, and

c. if so, is it, in all the circumstances, just to order the legal representative to compensate the applicant for the whole or part of the relevant costs?

Findings of fact

16. I can do little more here than repeat the findings I made in my strike-out judgment in which I found that the claimant:

a. had behaved unreasonably,

b. had deliberately and persistently failed to comply with required steps including Tribunal Orders, and

c. had pursued claims with no reasonable prospects of success.

17. The claimant made no appeal against my judgment.

18. The respondent relies primarily on unreasonable conduct throughout the proceedings as set out in my judgment where I found that,

a. there was a lack of progress with the claim, and I found that: "*This case commenced in July 2021 and more than 18 months later there is still no adequately defined list of issues, no case management orders have been made save for the provision of a schedule of loss and relating to further particulars. The case has not yet been listed for a final hearing*."

b. there were repeated procedural defaults by the claimant,

c. that by the date of the strike out hearing (24 February 2023), the case had "*barely begun*", the only significant order the claimant had complied with was provision of a Schedule of Loss, and that "*[a]ll other procedural steps have been aimed at trying to understand what the claimant's case actually is*."

d. the claimant had "*vacillated wildly*" over the last 18 months with the result that prior to the preliminary hearing "*it was impossible for the respondents to know what the legal case was which they had to respond to*",

e. the claimant had been professionally represented throughout,

f. that a preliminary hearing had been held to determine the issues; and that C had "*been given significant time to sort out and set out exactly what his claims are*",

g. expressly that "*the claimant's conduct has been unreasonable*" and that it "*is difficult to conclude other than the failings are deliberate*",

h. in considering the proportionality of strike out I held that: "*In my judgment, given the failings in the pleading of the claimant's case, given the number of opportunities the claimant has had to perfect his claim, given the length of time the claimant has had to explain precisely what he is claiming and given the fact that he has been professionally represented throughout, I consider that strikeout for unreasonable conduct is proportionate in this case and had the claims not been already struck out on the basis of no reasonable prospect of success, I would have no hesitation in striking out the claims for unreasonable conduct*",

i. I also held that in relation to the alternative application for strike out under Rule 37(1)(c), non-compliance with the Tribunal Rules or orders that: "…*I can only conclude that there is here a series of deliberate failures to properly plead this case in compliance with the Tribunal's Orders and I consider that strikeout for non-compliance with the Tribunal's Rules is proportionate in this case and had the claims not been already struck out on the basis of no reasonable prospect of success, I would have no hesitation in striking out the claims for non-compliance*."

19. In relation to the application for a wasted costs order against Mr Martins I note the following:

a. on 24 May 2023, Mr Martins told the Tribunal that costs had never before been raised, and also that he had never advised the claimant of the cost implications should his claim fail, neither of which were correct,

b. the claimant seems to have pursued his claim over an 18-month period without turning his mind to prospects of success and had not considered the risks of costs being sought or the potential impact of the claim failing, and if Mr Martins had not highlighted the risks to the claimant, arguably this is in itself vexatious and unreasonable behaviour, either on the claimant's behalf, that of his representative, or both,

c. Mr Martins failed to correct the record when it was highlighted to him that he had misled the ET regarding his and/or the claimant's knowledge of cost risks.

20. As well as the above the following findings of fact are also relevant:

a. two of the claims were out of time and the claimant accepted in oral evidence that there was nothing which prevented him from presenting those claims in time,

b. there was "*no reasonable prospect of the claimant persuading an Employment Tribunal that later detriments were evidence of a continuing state of affairs*", such as to bring the earlier claims in time,

c. my finding that: "*Taking the claimant's case at its highest…there is no reasonable prospect of [the claimant] persuading an Employment Tribunal that there was a circumstance of danger. Even if he could do that, there is no reasonable prospect of him persuading an Employment Tribunal that such danger was serious or imminent whether to himself or others. Furthermore, even if he could do both of those things, I consider that there is no reasonable prospect of him persuading an Employment Tribunal of the causation element of the statutory test for health and safety detriment under section 44(1A) ERA",*

d. EJ Harding's Order dated 20 December 2021, was that the claimant shall provide a list of detriments on which he relied by 7 January 2022 (by which time this case had been ongoing for over 5 months. The claimant replied 3 days late replicating the content of the claim form then some four days later provided a further list of 17 points which EJ Beck later noted "*were not particularised by date, nor did they give sufficient details of the detrimental treatment said to have occurred* …",

e. on 28 December 2022 he claimant made an application to amend his claim without addressing the time limit issue which inevitably arose with any clarity,

f. the claimant failed to respond to the respondent's application to strike out/for a deposit order in January 2023, and

g. failed to comment on, and therefore agree a hearing bundle for the hearing of the above application.

21. I finally note that in his submissions Mr Martins dealt only with the wasted costs issue. When I asked if he had any submissions regarding the application against his client he only made brief submissions on quantum and thus by default seemed to me to accept the force of the respondent's case.

Conclusions

Is the jurisdiction to make a costs award engaged?

22. As I found in the strike out hearing, over 18 months after the Claim was brought, it remained "*impossible for the respondents to know what the legal case was which they had to respond to*".

23. The impact on the case, and of course on the respondent was that despite the inadequately pleaded case,

    a. the respondent expended costs responding in the sure and certain knowledge that further costs would be incurred responding to a properly pleaded case at some point,

    b. in the event the case was never adequately pleaded, and the parties attended two detailed preliminary hearings (including the strike out hearing) for which the respondent had to undertake all preparation and at which they were represented by counsel,

    c. the claimant was slow to or entirely failed to correspond with the respondent's representatives which meant that further costs were incurred chasing the claimant/his representative, deadlines were ignored/missed, the claimant failed to agree simple matters such as bundles or draft agendas in a timely way, and failed to engage in any meaningful way, with the result that respondent had to try to resolve issues regarding directions with the Tribunal in order that procedural deadlines would not be missed.

24. In all the circumstances I am satisfied that the conduct of the claimant's case proceeded in a way which was unreasonable, disruptive, and abusive. Thus, the jurisdiction to make a costs award is engaged.

Is the jurisdiction to make a wasted costs award engaged?

25. In my judgment it is not.

26. I did not hear evidence from the claimant, but he has been present throughout the strike out hearing and at this costs hearing. He heard Mr Martin's submissions and at no point has he sought to resile from his case as put by his representative.

27. In the end the representative acts according to his or her client's instructions. Given all I have heard, I do not consider that i am in any position to find other than Mr Martins did his client's bidding, and it was his client's behaviour which prevented Mr Martins from dealing with this case more appropriately. I accept that he could have simply come off record and perhaps it is to his credit that he did not.

28. Despite one or two lapses by Mr Martins (for example in relation to his assertion that costs had not been previously mentioned) I do not consider that there is sufficient material from which I can conclude that he acted improperly, unreasonably or negligently.

29. That being the case I do not need to consider the issue of whether changing from a conditional fee to acting pro bono makes any difference to whether q representative is acting for profit.

Is it appropriate to make an award of costs?

30. I consider that is appropriate to make an award of costs in this case for the following reasons.

31. The claims were struck out because the claimant's handling of the whole proceedings was characterised throughout by unreasonable, deliberate and persistent failure properly to progress his own claim. As Ms Moore said in her submissions "the nature of the failures is set out above…it is striking that the sole significant order with which C complied throughout the 18 months of proceedings was providing a Schedule of Loss. Other than that, no substantive progress was made at all as the claim "*vacillated wildly*"" (the last two words being mine from my strike out judgment).

32. The Respondent is publicly funded and sought to challenge what they correctly saw as the unmeritorious claims at early stages in the case, to prevent further time and cost being expended by all parties, in particular:

    a. on 29 September 2021, the respondent made an application to strike out the claims due to no reasonable prospects of success, alternatively for a deposit order. This was not allowed, and the claimant was given the first of a number of opportunities to clarify his case,

    b. on 29 September 2021, the respondent, in the Response, accepted liability for all impugned acts of the second respondent, an individual employee of the respondent. Despite this, the claimant unreasonably refused to remove the second respondent as a party,

    c. at a preliminary hearing on 4 October 2022, as well successfully requesting a preliminary strike-out hearing, which was granted, the respondent sought an unless order by which claimant's claims would be struck out if he failed to comply with the key upcoming procedural steps. This was not granted, and although EJ Beck when refusing the application warned the claimant of the need to comply and recorded that he was "*aware he must comply*" he did not comply.

33. Despite these efforts the claimant pursued his claim, and his poor conduct continued. Again, as Ms Moore submitted "*It is hard to know what more a public body in [the respondent's] position can do when faced with a claim which is not only unmeritorious but is also being pursued in a wholly unreasonable manner*".

34. I have set out above the consequences for the respondent of the claimant's conduct of this case.

35. In all the circumstances I am satisfied that a costs award should be made against the claimant.

The amount of the award

36. The parties were content for me to undertake a detailed assessment of the costs sought which I did in accordance with Rule 44.3 of the Civil Procedure Rules.

37. I find that the respondent acted reasonable throughout these proceedings including by what they did to further the litigation, who they engaged to undertake the work and the time spent on that work.

38. The claimant was of course entitled to bring sa claim. The claim form was presented on 26 July 2021.

39. The respondent responded on 29 September 2021.

40. Following failed attempts to particularise his complaints the claimant and his representative attended a preliminary hearing at which, among other things, he was ordered to provide further particulars. That should have been straightforward and if it had been done the case would no doubt have proceeded reasonable to a final hearing. The claimant was required to respond with his further particulars by 7 January 2022. He failed to do so, and it was at this point that the claimant's unreasonable, disruptive and abusive conduct began.

41. In making the award below I have considered the claimant's means. But his position is essentially that he could not afford to meet any costs award which I do not consider a reason for not making an award.

42. Therefore, I am disallowing all costs prior to 7 January 2022.

43. All other costs are awarded. Respondents detailed schedules of costs show costs in dealing with documents, attendances on the client and counsel's fees.

44. Having discounted all costs before 7 January 2022 (including 10% for attendances where dates are not given), the total award of costs in favour of the respondent is £50,186.50.

45. Payment is to be made within 14 days of the date this judgment and reasons are sent to the parties.

Employment Judge Brewer

Date: 6 December 2023

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/