EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Mr C Whittingham	**v**	British Airways plc

JUDGMENT (COSTS)

The respondent's application for costs is refused.

REASONS

Introduction

1. The claimant Mr Whittingham was employed by the respondent from 1 April 2014 until 17 October 2020. He brought a claim for unfair dismissal. The claim form was presented on 7 December 2020, after early conciliation from 29 October 2020 to 29 November 2020.

2. The hearing of the claim was due to take place on 11, 12 and 13 July 2022, but it had to be postponed for judicial resourcing reasons.

3. The parties were notified on 8 July 2022 that the hearing could not go ahead, and were asked to provide new dates. The claimant did not reply to that request. Notice of the new hearing dates was sent on 16 July 2022. The re-scheduled hearing was due to take place on 14, 15 and 16 June 2023.

4. The respondent's solicitor contacted the claimant a few days before the re-scheduled hearing, with an amended bundle and a draft list of issues. The claimant did not reply.

5. The claimant did not attend the hearing on 14 June 2023 and was not represented. For reasons explained in a judgment and reasons given at the hearing on 14 June 2023 and sent to the parties in writing on 12 July 2023, I dismissed the claim under rule 47.

The respondent's application for costs

6. On 2 August 2023 the respondent made an application for costs against the claimant. (The dates in the background section of the respondent's

application are not correct. The procedural chronology with the correct dates is set out above.)

7. The respondent says that the claimant acted vexatiously and unreasonably by not engaging with the respondent and by not attending the final hearing.

8. The respondent says that the claim had no reasonable prospect of success because the claimant failed to confirm the basis on which he said his dismissal was unfair, and he failed to consider a costs warning letter sent on 21 May 2023 which said that the claim had no reasonable prospects of success.

9. The claimant replied to the respondent's application in an email on 22 September 2023. The claimant said that he had been suffering stress and anxiety because of serious family issues. He was trying to maintain a much needed new employment role and inadvertently lost track of the hearing dates. I accept what the claimant says about this.

10. The respondent said it was happy for the costs application to be decided without a hearing. The claimant did not request a hearing. I decided that in the interests of proportionality and saving time and costs, and in light of the parties' positions, the application could be decided without a hearing.

The law

11. The power to award costs is set out in the Employment Tribunal Rules of Procedure 2013. Under rule 76(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 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."*

12. Rules 74 to 78 provide for a two-stage test to be applied by a tribunal considering costs applications under Rule 76. The first stage is for the tribunal to consider whether the ground or grounds for costs put forward by the party making the application are made out. If they are, the second stage is for the tribunal to consider whether to exercise its discretion to make an award of costs, and if so, for how much.

13. In determining whether unreasonable conduct under rule 76(1)(a) is made out, 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, it is not necessary to analyse each of these aspects separately, and the tribunal should not lose sight of the totality of the circumstances (Yerrakalva v Barnsley Metropolitan Borough Council 2012 ICR 420, CA). At paragraph 41 of Yerrakalva, Mummery LJ emphasised that:

> *"The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it has."*

14. When assessing whether the 'no reasonable prospect of success' ground in rule 76(1)(b) is made out, the test is not whether a party had a genuine belief in the prospects of success. The tribunal is required to assess objectively whether at the time it was brought, the claim had no reasonable prospect of success, judged on the basis of the information known or reasonably available to the claimant, and what view the claimant could reasonably have taken of the prospects of the claim in light of those facts (Radia v Jefferies International Ltd EAT 0007/18).

Conclusions

Are there grounds for a costs order?

15. I first need to consider whether there are grounds for a costs order under rule 76(1)(a) or (b).

16. The claimant's failure to engage with the respondent and to attend the hearing was unreasonable. He should have replied to the respondent and, if he was not able to attend the hearing, he should have let the respondent and the tribunal know. The effect of these failures was that the hearing was unable to proceed on 14 June 2023. There are grounds to make a costs order under rule 76(1)(a).

17. I do not find that this conduct was vexatious. It was not deliberate or for an improper purpose. I have accepted what the claimant says about his reasons for failing to engage with the respondent and for failing to attend the hearing. He was dealing with very difficult circumstances and the claim went out of his mind.

18. Also, as an unrepresented party, it was not unreasonable of the claimant not to accept what was said in a costs warning letter sent by the respondent.

19. Turning to rule 76(1)(b), the claimant's claim for unfair dismissal is not one which, assessed objectively at the time it was brought, had no reasonable prospect of success. The claimant said in his claim form that the respondent failed to comply with the disciplinary policy and that there were three procedural problems with the dismissal process. He complained about his witness statement not being sent to him to be verified, about a failure to interview a crucial witness and about the use of previous disciplinary warnings. Those are all matters which might have affected the fairness of the dismissal. It is not possible to say that the claimant should reasonably have been aware that his claim had no reasonable prospect of success.

20. This means that there are not grounds to make a costs order under rule 76(1)(b).

Exercise of discretion

21. As I have found that there are grounds to make a costs order against the claimant under rule 76(1)(a), I go on to consider whether to exercise my discretion to make an order.

22. In considering whether I should award costs, I have taken into account the fact that the claimant was given a costs warning by the respondent. However, for the following reasons, I have decided that I should not exercise my discretion to make an award of costs:

    22.1 orders for costs in the employment tribunal remain the exception rather than the rule;
    22.2 the claimant was a litigant in person;
    22.3 the claimant was facing very difficult personal and family circumstances and I have accepted that these were the reason for his failures to engage and attend the hearing;
    22.4 ultimately the claim has been dismissed and so the respondent has not been put to additional costs as a result of the claimant's failures to engage and attend.

23. For these reasons the respondent's application for costs is refused.

Employment Judge Hawksworth

Date: 28 November 2023

15/1/2024
Sent to the parties on: .....
J Moossavi
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For the Tribunal Office

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