



EMPLOYMENT TRIBUNALS

Claimant: Mr C Chirwa

Respondent: Craegmore Healthcare Company Ltd

Considered at: Leeds Employment Tribunal (on the papers)

On: 15 December 2023

Before: Employment Judge Armstrong

JUDGMENT

1. The respondent's application for a costs order is refused.

REASONS

Background to the application

1. There has been an unfortunately significant delay in dealing with this costs application. The chronology is as follows:
2. On Monday 3 July 2023, the matter was listed for a final hearing, with a time estimate of four days. On Saturday 1 July 2023 the claimant's solicitor contact the Tribunal and the respondent, stating that he was no longer instructed in the matter and confirming that the claimant would attend the hearing on Monday 3 July 2023 in person.
3. The parties attended the Tribunal on 3 July 2023. The respondent was represented by counsel. The claimant attended in person, supported by his daughter. A Shona interpreter was also present at the hearing to assist Mr Chirwa.
4. The claimant made an application to postpone the hearing and this was granted on 3 July 2023. Oral reasons were given for that decision at the hearing and neither party has requested written reasons for the decision. I have retained my notes of the decision. There were three aspects to the claimant's application: (1) he sought to adduce further witness evidence; (2)

he could not represent himself, and his daughter was not able to support him for the remainder of the listed days (due to a medical appointment involving her child); (3) he sought to amend his own witness statement now that he had the benefit of his daughter to assist with its translation.

5. The postponement was not granted on the basis of the proposed additional witnesses. However, for the reasons given at the hearing, the Tribunal was satisfied that a fair hearing was not possible without legal representation or support from his daughter for the claimant. The claimant's wish to amend his witness statement added a complexity to the claimant's difficulty in representing himself, but we were satisfied that had the claimant's daughter been able to represent him throughout the hearing, we could have proceeded despite that issue. We were not satisfied that it was in the interests of justice to commence the hearing in the likelihood that the case would then go part-heard as we would not be able to complete the hearing in the time that the claimant's daughter was available. Therefore the application to postpone the hearing was granted.
6. At the hearing, I directed that any costs application arising out of the postponement should be reserved to me and recorded that the respondent was content for any such application to be dealt with on the papers.
7. On 10 July 2023 the respondent made an application for a costs order, which was copied to the claimant and his former solicitor, as follows:

'The Respondent respectfully makes an application against the Claimant or his former representative AW [Avery Walters Solicitors] for a preparation time order/wasted costs order under Rule 76 and Rule 80 of the Employment Rules of Procedure.

The cause of the adjournment was the Claimant's lack of representation. The Claimant was still represented unless [sic.] less than 48 hours before the final hearing was due to take place.

Whilst it is not argued that changing one's representation, even very late in the proceedings, is unreasonable or improper per se, if changing ones representation so late in proceedings leaves a party without the ability to properly and fairly conduct the proceedings, such conduct may be unreasonable or improper.

The decision to change representation was made by the Claimant on the evidence he gave the Tribunal. The Claimant informed the Tribunal, in essence, that he wished to take litigation steps (such as obtain further witness evidence) that AW did not agree to. However, the Claimant also gave evidence that part of the reason for choosing to end that representation was 1) receiving a copy of his witness statement only on Saturday, 1 July 2023, 2) that his submitted witness statement contained a significant number of inaccuracies and untrue statements and 3) that his witness statement had not been translated into a language the Claimant could fully comprehend.

It is the Respondent's position that those matters would be ostensible evidence of unreasonable or improper conduct by AW.

The Respondent has prepared for a hearing on the basis of the Claimant's statement being an accurate and truthful account. The Respondent has incurred legal costs in preparing for the final hearing and instructing Counsel to attend and operational costs of having 3 senior employees attend for a 4 days hearing.

In the circumstances, the Respondent avers that the cause of the adjournment was either unreasonable conduct by the Claimant in abandoning representation at a time when it would leave him unable to properly represent himself, or unreasonable or improper conduct by AW in preparing and serving a witness statement without properly obtaining instructions. Those actions are the direct cause of the Respondent incurring unnecessary costs.

The Respondent seeks costs as detailed in the attached schedule and evidence.

We believe the application has been made in line with the overriding objective as it ensures the matter is dealt with justly and fairly and at proportionate cost.'

8. Attached to the application are counsel's fee note for advising in conference and brief for the postponed final hearing in the total sum of £3,700 plus £740 VAT. There is also attached a schedule of solicitors' costs '*following exchange of witness statements on 16 June 2023*'. The schedule of costs comprises £1119.07 solicitors' costs, £315 'operational costs' of three employees attending the hearing for 2.5 hours, and counsel's fees (as set out in his fee note) in the total sum of £5,874.07.
9. On 17 July 2023 the application was referred to the duty Employment Judge who directed that the matter should be referred to me as I had reserved any costs application to myself.
10. On 18 July 2023 the claimant's former solicitor, Mr Parascandalo of Avery Walters Solicitors provided a response to the application, copying in the parties. He refers to the claimant as being '*of very limited financial means*.' He sets out that the claimant engaged his firm on a contingency fee agreement on 8 August 2022, which applies to the firm's fees but not any counsel's fees. He states that:

'On 1st July 2023 as the Claimant could not fund Counsel privately and as we could not have find [sic.] Counsel to deal with this matter on the basis of a contingency agreement we came off record and notified the Tribunal.

We did have Representation reserved for the hearing on the proviso that the Claimant could secure the funding but unfortunately, he could not do so due to insufficient funds.'
11. Mr Parascandalo highlights that he was not present at the hearing and indicates that he would require a transcript of the hearing if he is required to comment. He asserts his view that the matter was ready for hearing, on the basis that the claimant would represent himself. He asserts that his advice was that it would not have been appropriate to adduce additional witness evidence shortly before the hearing (presumably, when he was instructed to do so by the claimant), and that he did not consider the additional witness evidence was relevant. He also makes some representations regarding the amount of the costs claimed by the respondent.
12. On 20 July 2023 the application was again referred to the duty Employment Judge. Again, it was directed to be referred to me. The duty judge also

direct that the Tribunal should write to the claimant requesting his comments and information regarding his means.

13. On 24 July 2023 the Tribunal wrote to the claimant requesting the claimant's comments on the application, but unfortunately failing to request information regarding his means.

14. On 3 August 2023, the claimant wrote to the Tribunal (but did not copy in the respondent), stating:

'I can't say much about the letter as it was not my fault that, Andrew did not attend the hearing in July. However, I attended the first day of the hearing and I don't know why Priory [the respondent] is asking for such a lot of money. Their three members of staff did not attend the hearing for three days, Andrew might have already responded to the letter and I am not aware if he did. Apologies for late response I thought Andrew had already commented.'

15. The referral was then forwarded to me on 10 August 2023. I was on annual leave at the time and then listed on other matters on my return. I considered the application on 7 September 2023 and directed that the Tribunal should write to the claimant as follows, directing a response within 7 days:

'In considering the respondent's application for a costs order, the Tribunal may have regard to your ability to pay any such order. Please can you provide details, supported by evidence where possible, as to whether or not you would have the financial means to pay the costs sought by the respondent.'

16. Unfortunately, the matter was not referred back to me thereafter, and therefore I was not aware that the claimant had not responded and that the application was still outstanding. I have dealt with the application as soon as possible upon becoming aware that it was still pursued by the respondent when it was raised at the final hearing on 20-22 November 2023.

17. In her written judgment dated 22 November 2023, EJ Wade records at paragraph 11:

'As a result of the postponed hearing the claimant was directed to provide evidence of his means by the Employment Judge following a costs application from the respondent. He had not done so by the start of this hearing.'

18. Of potential relevance to this application is the Tribunal's finding at paragraph 73:

'Since his dismissal the claimant has been working for cash, undertaking cleaning of cars and premises through his church and others. He has not banked the sums earned, nor kept accounts, and he has not registered as self-employed. He could not quantify the sums earned, described them as small and that he has used them to pay rent and buy food. He could not say how much his rent was per month. He confirmed he was also in receipt of a pension. We make these findings because his evidence was

somewhat at odds with the schedule of loss, which set out no work or mitigation since dismissal.'

Relevant Law

19. The respondent frames its application as: *'an application against the Claimant or his former representative AW for a preparation time order/wasted costs order under Rule 76 and Rule 80 of the Employment Rules of Procedure.'*

20. Rule 75(1) of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ('the Rules') defines a 'costs order' as:

*'an order that a party ("the paying party") make a payment to—
(a) another party ("the receiving party") in respect of the costs that the receiving party has incurred while legally represented or while represented by a lay representative;*

21. Rule 75(2) defines a 'preparation time order' as:

'an order that a party ("the paying party") make a payment to another party ("the receiving party") in respect of the receiving party's preparation time while not legally represented.'

22. It is therefore clear that the respondent is not entitled to or in reality applying for a 'preparation time order'.

23. Rule 76, in so far as relevant provides:

'(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;

(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.

(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.'

24. Rule 77 provides:

'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.'

25. Rule 78 provides that the Tribunal may make a costs order up to £20,000 or direct or carry out a detailed assessment of costs in excess of that sum, as well as the payment of Tribunal fees and the costs of a lay representative.

26. Rule 80 defines a 'wasted costs order' as follows:

'(1) A Tribunal may make a wasted costs order against a representative in favour of any party ("the receiving 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.'

Costs so incurred are described as "wasted costs".'

27. The procedure for applying for and considering a wasted costs order is set out in rule 82 and mirrors that for a costs order.

28. Rule 84 provides as follows:

'In deciding whether to make a costs, preparation time, or wasted costs order, and if so in what amount, the Tribunal may have regard to the paying party's (or, where a wasted costs order is made, the representative's) ability to pay.'

29. When considering whether to make a costs order under rule 76, the Tribunal must apply a three-stage test: (1) does a party's (or their representative's) conduct fall within rule 76(1)(a) – i.e. is the costs jurisdiction engaged; (2) If so, is it appropriate to exercise the Tribunal's discretion to award a costs order; and (3) If so, it must then determine the amount of any award (*Daly v Newcastle Upon Tyne Hospitals NHS Foundation Trust EAT 0107/18*).

30. The Employment Appeal Tribunal has held that litigants in person should not be held to the same standards of conduct and reasonableness as a professional representative with experience of the Tribunal process (*AQ Ltd v Holden 2012 IRLR 648, EAT*).

31. In determining whether to make a costs order on the basis of 'unreasonable' behaviour, the Tribunal should consider the '*nature, gravity, and effect*' of the unreasonable conduct *McPherson v BNP Paribas (London Branch) 2004 ICR 1398, CA*.

32. The wasted costs provisions mirror those within the civil jurisdiction and the EAT has held that accordingly the case law applicable to that jurisdiction is relevant to any consideration of a wasted costs order in the Employment Tribunal (*Mitchells Solicitors v Funkwerk Information Technologies York Ltd EAT 0541/07*).

33. A three stage test applies (*Ridehalgh v Horsefield and other cases 1994 3 All ER 848, CA*): (1) has the legal representative acted improperly, unreasonably, or negligently? (2) if so, did such conduct cause the applicant to incur unnecessary costs? (3) if so, is it in the circumstances just to order the legal representative to compensate the applicant for the whole or any part of the relevant costs?
34. Improper, negligent, or unreasonable behaviour has been defined as follows (*Ridehalgh v Horsefield 1994 3 All ER 848, CA; Medcalf v Mardell and ors 2002 3 All ER 721*): ‘improper’ includes conduct that would ordinarily be held to justify disbarment, striking off, suspension from practice or other serious professional penalty; ‘unreasonable’ describes conduct that is vexatious, designed to harass the other side rather than advance the resolution of the case; ‘negligent’ should be understood in a non-technical way to denote failure to act with the competence reasonably to be expected of ordinary members of the profession.

Decision

35. The respondent summarises its application as follows:

‘the Respondent avers that the cause of the adjournment was either unreasonable conduct by the Claimant in abandoning representation at a time when it would leave him unable to properly represent himself, or unreasonable or improper conduct by AW in preparing and serving a witness statement without properly obtaining instructions.’

36. I therefore approach the application as being for:
- (i) A costs order under rule 76(1) on the basis of the claimant’s unreasonable behaviour in abandoning his representation in all the circumstances; or
 - (ii) A wasted costs order under rule 80(1)(a) on the basis of the claimant’s representative’s improper conduct in the preparation of the claimant’s witness statement without proper instructions.

Costs order under rule 76

37. Firstly, I must consider whether the claimant’s behaviour was unreasonable such that the costs jurisdiction is engaged. It appears from the submissions made by the claimant and Mr Parascandolo that there was a misunderstanding between them. The claimant states he does not know why his representative did not attend the hearing. Mr Parascandolo states that it was because at the eleventh hour the claimant failed to provide funds to secure the attendance of counsel to represent him. There also appears to have been a disagreement as to the relevance of some further witness evidence.
38. On balance, I am satisfied that it was unreasonable for the claimant to withdraw instructions from his legal representative by failing to provide funds such a short time before the hearing. The jurisdiction to make a costs order is therefore engaged.

39. However, I am not persuaded that I should exercise my discretion to make an award of costs and I refuse the application at the second, discretionary, stage. This is for two reasons.
40. Firstly, I take into account the claimant's vulnerabilities. English is not his first language and his communication difficulties were apparent at the hearing on 3 July 2023. Furthermore, even with the benefit of a translator, his difficulties with communication and explaining his views were such that we were satisfied that a fair hearing was not possible without representation. Taking this into account, I am not satisfied that I should exercise my discretion to make a costs order.
41. Secondly, in accordance with Rule 84, I have regard to the claimant's ability to pay any costs order which I may make. Although the claimant has not provided direct evidence of his means, I note that his solicitor describes him as '*of very limited financial means.*' This is consistent with the findings made by EJ Wade. It is also consistent with his failure to provide funds to instruct counsel. I consider it is unlikely in the extreme that the claimant would be able to satisfy any costs order, were I to make one.
42. On balance, therefore, I am not satisfied that a costs order should be made against the claimant.

Wasted costs order – rule 80

43. The respondent's application is made on the basis that the claimant's solicitor '*prepared and served a witness statement without properly obtaining instructions.*' As set out above, this was not the reason for the postponement of the hearing. Had the claimant been capable of representing himself, or had his daughter been available, this issue could have been dealt with without the need for a postponement. I also note that at the final hearing, the claimant confirmed his witness statement to be true as drafted by his solicitor, save for one minor amendment (see paragraph 10 of the judgment of EJ Wade). I am therefore not satisfied that there was any unreasonable conduct by the claimant's solicitor in this regard.
44. The application for a wasted costs order is not made on the basis that the withdrawal from the proceedings at such a late stage by the claimant's solicitor was unreasonable conduct within the meaning described by the case law. I have considered whether this is the case and I am satisfied that it is not.
45. I am therefore not satisfied that there was unreasonable conduct by the claimant's representative and therefore I do not make a wasted costs order under Rule 80.
46. The application is dismissed.

Employment Judge **Armstrong**

Date: 14 December 2023