EMPLOYMENT TRIBUNALS

Claimant: Mr McKenzie Uruakpa

Respondent: Department for Education and others

Heard at: Birmingham by CVP on 12 December 2023 and reserved to 5 January 2024

Before: Employment Judge Hindmarch

Appearances
For the claimant: Did not attend
For the respondent: Mr Lewis – Counsel

JUDGMENT

The First Respondent's application for costs is upheld in the sum of £20,000.

REASONS

1. These claims came before me on 3 and 4 July 2023 and at that Hearing I struck the claims out under Rule 37.

2. My strike out Judgment, with reasons, was dated 7 August 2023 and was sent to the parties on 8 August 2023. This Judgment should be read in conjunction with the strike out Judgment.

3. On 31 August 2023, solicitors acting for the First Respondent made a written application for costs. This was in compliance with Rule 77 Employment Tribunals (Constitution and Rule of Procedure) Regulations 2013, Schedule 1 which requires a party to apply for a costs order within 28 days of the Judgment finally determining the proceedings being sent to the parties.

4. The Tribunal listed the costs application for a hearing before me on 12 December 2023.

5. Mr Lewis, Counsel for the first Respondent, attended the hearing. The Claimant did not. I was not surprised the Claimant did not attend given his diminishing participation in the hearings in these claims. This was the 6th hearing. The Claimant had legal representation at the first 2 hearings, a solicitor and then a direct access barrister. At the third hearing which took place on 16 February 2022, the Claimant did not attend, instead his mother attended on his behalf and a fit note was produced explaining the Claimant was unable to attend by way of 'tension headache/stress.' The hearing was postponed in light of this medical evidence.

6. The fourth hearing took place on 1 July 2022. As I noted in my strike out Judgment a feature of this hearing was the Claimant's limited participation. He did not attend at the start of the

hearing, instead his parents and persons describing themselves as his uncle and brother attended. These people told the Employment Judge that they did not know the Claimant's whereabouts but that he was unwell. No fit note was produced on this occasion. The Employment Judge informed those present on the Claimant's behalf that he expected the Claimant to join the hearing. The Claimant did then join the hearing but said that he was unwell and had been advised by his GP to attend A&E. The Employment Judge ordered the Claimant to provide medical evidence as to his inability to attend the hearing within 7 days. I understand no such medical evidence was ever produced by the Claimant.

7. The fifth hearing was the strike out application that I deal with in July 2023. The Claimant did not attend. Instead, an hour before the hearing began, an email had been sent to the Tribunal from the Claimant's email address but signed by his mother on his behalf, stating that the Claimant was unwell, attending his GP surgery and hospital and 'it is believed Mr Uruakpa, witness and other have been advised not to engage with any individual or organisation involved in criminal activity.'

8. At this sixth hearing, the Claimant did not attend, and I am not aware that on this occasion he had sent any email to the Tribunal or the Respondents regarding his non-attendance or any reason for it. I enquired of Mr Lewis whether his instructing solicitors had heard from the Claimant at all. He told me that they had emailed the Claimant in preparation for this hearing on 6 December 2023 using the email address that the Claimant has provided on some of his ET1's and which he has used when communicating in his own name with the Tribunal, the Respondent's, their solicitors and various other parties. Mr Lewis told me the email was headed 'Private and Confidential' and referred to this costs hearing by date and provided the Claimant with the means to access a proposed bundle for use at this hearing. The first Respondent's solicitors invited the Claimant's input regarding the bundle and asked whether there were any further documents that he might like to include. I was told this email followed an earlier email to the parties from the Tribunal asking for a bundle. The Claimant did not reply to the first Respondent's solicitor's email.

Proceeding in the Claimant's absence

9. Mr Lewis' position was that I should proceed in the Claimant's absence. There was no explanation for his non-attendance and he had not on this occasion made any contact suggesting he was unwell.

10. I agreed we should proceed. As explained in the narrative above, the Claimant has had diminishing participation in these hearings, I am satisfied he was aware of the hearing taking place given the first Respondent's solicitors very recent communication with him and the Tribunal's request for documents and sending of the CVP link to the parties. This is the 6th hearing. The first Respondent has been put to costs and delay. Having regard to the overriding objective it is proportionate to press on and deal with this application which was made in August 2023 and which avoids further delay and saves expense for the first Respondent. I cannot be satisfied that if I postponed the Claimant would in fact participate in any re-listed hearing.

The Costs Application

11. As already noted this was made in writing by the first Respondent's solicitors on 31 August 2023. The first Respondent seeks costs under Rule 76 on three grounds, namely that the Claimant has acted vexatiously, abusively disruptively or other unreasonably in the bringing of the proceedings or the way that the proceedings have been conducted and/or that the claims

had no reasonable prospects of success and/or that the Claimant has been in breach of an order.

12. The first Respondent's position was that the Claimant has acted unreasonably both in the bringing of and in the conduct of these proceedings. As noted in my strike out Judgment there were 8 separate claims issued in various Employment Tribunal regions and against a host of Respondents, some of whom were never the Claimant's employer, and thus could never be liable, such as Secretarys of State and the Respondents then solicitor.

13. The first Respondent argued that this was of itself unreasonable conduct and put the Respondents to considerable additional time and expense defending each of these claims, which were eventually consolidated and dealt with at the Midlands West Region. At the first hearing on 16 February 2021, the Employment Judge noted that the statutory defence was not being pleaded by the first Respondent, as the Claimant's former employer, and he asked the Claimant to 'consider whether any named individual (Respondents) are required to be parties to the action.'

14. At the fourth preliminary hearing on 1 July 2022, over 12 months later, again the Employment Judge noted it was unclear as to why there were so many Respondents and stated the Claimant 'should carefully consider whether it really is necessary to include any additional Respondents (to the first Respondents). He made an Order that the Claimant should within 14 days either confirm that individuals named as Respondents could be removed from the proceedings or explain why they needed to remain as Respondents. The Claimant did agree at that hearing that 3 Respondents were no longer being pursued. The Claimant did not comply with the Order and when the strike out hearing came before me in July 2023, again after further significant time had passed, all Respondents bar their solicitor remained as named Respondents in the claims.

15. As to his conduct of the proceedings, the first Respondent referred to the correspondence sent by the Claimant, and those purportedly acting on his behalf, which was voluminous, was sent to very many parties, a large amount who had nothing whatsoever to do with those proceedings, and which contained wild and unfounded accusations of fraud, criminal conduct and serious misconduct. Many emails had lengthy attachments. I have set out in detail in my strike out Judgment this correspondence and do not intend to repeat matters here save to say that the sending of such correspondence would no doubt have put the first Respondent to much additional cost involved in reading these communications, understanding them and later adding them to bundles for the hearings.

16. In my strike out Judgment at paragraph 92 I referred to this correspondence in the following way, "The use of a narrative calling for investigation and charges on the part of various police forces is clearly aimed at intimidating the Respondents and is based on spurious allegations of fraud and impropriety. In some of these emails the Claimant and/or those acting on his behalf seek to persuade any recipient to believe some serious matters are afoot by asserting they have had 'advice' from entities who 'believe' that investigations should take place and by referring to crime reference numbers. These include entities such as the Bar Standards Board, CPS, FBI, HMRC, Intepol, Serious Fraud Office, and the National Crime Agency. The emails on occasion suggest serious wrongdoing, accusing some of the Respondents of fraud, forgery, COVID-19 breaches, impersonating an MP. There is a growing list of people that the Claimant, or those writing on his behalf, are calling to be interviewed and charged to include individual Respondents and their solicitor, Counsel for the Respondents and Employment Tribunal staff and Judges." I described this as 'unreasonable.' In fact, it is in my view aimed at causing anxiety and distress for those involved.

17. I went on at paragraph 96, "I am of the view the Claimant's behaviour is scandalous, unreasonable, and vexatious. He is mis-using his claims to vilify others by sending emails demanding those involved with the Tribunal process and Respondents be interviewed and charged by the police where the claims, as I understand them, do not in any way involve criminal activity. He is subjecting these people to inconvenience and harassment."

18. The first Respondent also relies on the Claimant's persistent disregard of Tribunal Orders. I have already referred to two such examples at paragraphs 6 and 14 above, and there are further examples below.

19. At the third preliminary hearing, where the Claimant did not attend but his mother did on his behalf, it was noted that the Claimant had not made the Respondents aware that he was going to apply for a postponement such that they had incurred the costs of instructing Counsel. The Employment Judge noted 'when parties make an application, they must notify the other parties. This is a mandatory requirement under the Rules and is not discretionary.'

20. Similarly, at the fourth preliminary hearing, the Employment Judge again noted that the Claimant omits to copy in the Respondent's solicitors and informed him that practice should stop and made an order that whenever he writes to the Tribunal, he must copy them in.

21. Despite these warnings and orders the Claimant did not comply including on the morning of the strike out (5th) hearing when he emailed to say he was unwell but failed to comply in the Respondent's solicitor. I am told this practice continued when the Claimant made an application for reconsideration (of my strike out application).

22. At the fourth hearing, the Employment Judge had warned the Claimant about the volume of his written correspondence. The Regional Employment Judge had to write to the Claimant a month later on 5 August 2022 referring to the volume of emails he was sending and asking him to communicate with the Tribunal solely by pre-paid post. 5 days later on 10 August 2022, and having received further emails from the Claimant, the Tribunal again wrote to him reminding him of the Regional Employment Judge's order and that 'compliance is not optional.' On 19 August 2022, the Tribunal wrote again to the Claimant noting he had breached the order of 5 August 2022 (by sending emails) and warning him of possible sanctions. Despite this the Claimant continued to send emails.

23. Some of the communications sent on the Claimant's behalf were sent by someone describing themselves as 'McKenzie friend.' On 13 May 2022, the Tribunal wrote to the Claimant directing him to confirm who this person was. It does not appear the Claimant replied. On 26 May 2022, the Tribunal chased for a response and there is nothing to suggest the Claimant replied. At the fourth hearing, the Employment Judge informed the Claimant, it is not appropriate for the Tribunal or other parties to correspond with unidentified people.' Despite this, the emails from McKenzie friend continued until late January 2023. From 31 January 2023, the same email address used by 'McKenzie friend' was used to send emails on the Claimant's behalf but the signature became 'Claimant, Victim and Witness Representative.' Again, this individual did not identify themselves by name.

24. In my strike out Judgment, I noted at paragraph 87, "It is my view that the Claimant has behaved unreasonably and that he has failed to comply with Tribunal orders." I set out the detail of the non-compliance above and in my strike out Judgment stating that the Claimant's "steadfast refusal to comply with the orders and direction of the Tribunal" was unreasonable.

25. The first Respondent also says the Claimant's failure to attend hearings is unreasonable conduct which has also led to increased costs. I have dealt with the Claimant's decreasing participation earlier in this Judgment.

26. In Mr Lewis' submission there should be a three-stage process to the question of costs. Firstly, I should consider whether grounds for a costs order are made out and I should focus on the Claimant's conduct. In his submission, my strike out Judgment and matters set out above, contain findings that support a finding that the Claimant has acted unreasonably, and breached orders and his conduct falls squarely into Rule 76 (1) (a).

27. The next step is to consider whether to exercise my discretion; is it appropriate in all these circumstances to make a costs order in light of the breach? Mr Lewis acknowledged that whilst the Claimant had legal representation at the first 2 hearings, he had been since that time a litigant in person however, he should not be shielded from findings of unreasonable conduct. Mr Lewis recognised that cost orders are rare but argued this is a case that readily falls into a category where is it just and fair to make such an order. The first Respondent relied on the nature and extent of the unreasonable conduct; and the prolonged pattern of it.

28. The third issue was if I decide to make a costs order, then the amount. The first Respondent had provided a signed statement of costs showing that costs of nearly £40,000 had been incurred by it, however it was limiting its application to £20,000. It was acknowledged by Mr Lewis that as the Claimant had provided no documentary evidence as to means, and had not attended this hearing, there was no way to assess his ability to pay should I decide to have regard to this.

29. Mr Lewis referred me to Mirikwe v Wilson & Co Solicitors UK/EAT/0025/11, Pranczk v Hampshire County Council 2022 UK/EAT/0272/19/VP and Jilley v Birmingham and Solihull Mental Health NHS Trust and others UKEAT/0584/06, UKEAT/0155/07. In Jilley the EAT held that a Tribunal has no duty to take the ability to pay costs into account and that "there may be cases where for good reason ability to pay should not be taken into account: for example, if the paying party has not attended or has given unsatisfactory evidence about means."

The Law

30. Costs orders are dealt with under Rule 75 and 76. Rule 76 (1) provides, "A Tribunal may make a costs order, and shall consider whether to do so, where it considers that –

    a) A party…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…had no reasonable prospect of success."

31. Rule 76 (2) provides, "A Tribunal may also make such an order where a party has been in breach of any order or practice direction…".

32. Rule 77 says a costs order may be, "a specified amount, not exceeding £20,000."

33. Rule 84 provides, "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."

34. In terms of unreasonable conduct, which is the principal thrust of the first Respondent's application, unreasonable is to be understood according to its national and ordinary English meaning – Dyer v Secretary of State for Employment EAT 183/83. A Tribunal must take account of the 'nature, gravity and effect' of any unreasonable conduct McPherson v BNP Paribas (London Branch) 2004 ICR 1398.

35. If unreasonable conduct is made out, the Tribunal is not mandated to make a costs order. Whether or not to do so is discretionary and costs are the exception, not the rule. Costs are to compensate the receiving party and are not punitive in respect of the paying party.

Conclusions

36. I have no information from which I can assess the Claimant's means/ability to pay. He has not to my knowledge responded to the costs application and did not attend this hearing. His diminishing attendance at hearings is noted above and is a further example of his unreasonable conduct.

37. Looking at the statement of costs I can well understand how they have risen to £40,000. The First Respondent's solicitors were in the main instructed by all individually named Respondents too, and were dealing with many hearings and much correspondence as set out in the Judgment and in my strike out Judgment. I consider that to limit this application to £20,000 (that being half of the costs incurred) is reasonable and proportionate.

38. It is clear that the Claimant's behaviour in bringing and conducting these proceedings has been unreasonable for the reasons set out above and in my strike out Judgment. I have the established grounds on which I may make a costs order.

39. I then have a discretion as to whether to do so. I accept that costs orders are rare. I also accept that for the most part of these proceedings the Claimant has been a litigant-in-person. That being said, the Tribunal has given him ample guidance and warnings, and despite this his unreasonable conduct continued to the extent that I determined it was not possible to have a fair trial and it was proportionate to strike out the claims. In my view, I should exercise my discretion in favour of making a costs order. I have taken into account the 'nature, gravity and effect' of the Claimant's unreasonable conduct.

40. The Tribunal may have regard to the Claimant's ability to pay. I have no information as to the Claimant's income, assets or expenditure. He has not attended and has not provided any evidence. I therefore have not taken the ability to pay into account. I am of the view the costs sought by the First Respondent, limited to £20,000 are reasonable and have been incurred due to the unreasonable bringing and conducting of these proceedings by the Claimant. I am satisfied the Claimant should pay these costs.

Employment Judge Hindmarch
5 January 2024