



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mrs M Manhiri

✓ **R1 Apostolic Faith Mission
International Ministries (UK)
Wolverhampton Assembly**
**R2. Apostolic Faith Mission
International Ministries UK**

PRELIMINARY HEARING

Claimant's Costs Application

Heard at: Birmingham CVP 3

On: 25 November 2022

Before: Employment Judge Dean

Appearance:

For the Claimant: Mr GT Chapwanya, solicitor

For the First Respondent: Dr Mavaza, legal representative

For the Second Respondent – Mr Hillary Chindodo, Board of Trustees

Mr Joshua Chigorimbo Board of Trustees. Attending

JUDGMENT

The judgment of the Tribunal is as follows:

1. The claimant's application that the first respondent be ordered to pay costs does not succeed.

Reasons

Application for costs

1. Mr Chapwanya on behalf of the claimant makes an application that, following the determination on 31 January 2022 that the First Respondent had failed to present a response to the complaint in time and there was no good reason to extend time to allow the late response to be accepted the First Respondent,

an award of costs be made in light of that respondent's unreasonable conduct of the proceedings.

2. By way of background this cost hearing comes before me following an earlier hearing convened on 15 December 2021 during which the First Respondent made an application that their response that was not presented in time should be allowed to be considered. That hearing on 15 December 2021 was postponed to 31 January 2022 at which the First Respondent's application to be granted an extension of time to present a response out of time was refused.
3. On 18 November 2022 in advance of this hearing a letter was received by the Employment Tribunal offices from Angels solicitors informing the tribunal that they had been consulted by the Second Respondent who had not been served with the claimants original application. The ET1 was served on the Second Respondent on the 23 November 2022 before the Hearing on the 25 November 2022 with a covering letter. At the hearing, though not represented by solicitors Mr Chindodo and Mr Chigorimbo both Trustees of the Second Respondent attended to observe.
4. I have assured the Second Respondent that the cost hearing is one in respect of an application brought against only the First Respondent and that the Second Respondents, subject to entering a timely response to the complaint once it is served on them, will be heard at a final hearing. I have given case management orders for the future conduct of the case.
5. I would pause at this stage in my reasons to extend my apologies to the parties for the delay and confusion that has become evident in the progress of this case to a final hearing. Regrettably for reasons of which the parties have previously been advised EJ Dean has only recently returned to work after a lengthy period of absence.
6. The claimant's application of 14 February 2022 for costs in the sum of £3987.50 plus VAT is made on the basis outlined in their response of 14 February 2022 being that the claimant's application to strike out the First Respondent's response under Rule 37 (1)(c) of the Employment Tribunal Rules of Procedure 2013 at a hearing by CVP on 15 December 2021 was postponed on the respondent application and was determined in favour of the Claimant on 31 January 2022. The Response having been rejected the Claimant asserts that costs should have followed the cause.
7. The First Respondent resists the application for costs and has placed before me a bundle of documents [R1] which extends over 20 pages which includes a statement from Dr Moses Chiwandamira who is the chartered accountant at Framework Accountancy who prepared the financial statements for the church for the 12 month period 1/10/2021 to 30/09/2022. The Notes to the Accounts of the First Respondent record income to be £2600 and expenditure to be £2106 allowing funds at 30 September 2022 to be £494.

The relevant law

8. References to rules below are to rules under Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.
9. **Rule 76 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; or

(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.

10. The relevant part of Rule 78 provides:

"A costs order may—

(a) order the paying party to pay the receiving party a specified amount, not exceeding £20,000, in respect of the costs of the receiving party;...."

11. Rule 84 provides:

"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."

12. A Tribunal must ask whether a party's conduct falls within rule 76(1)(a) or (b) is applicable. If so, the Tribunal must then go onto ask whether it is appropriate to exercise the discretion in favour of awarding costs against that party. It is only when these two stages have been completed that the tribunal may proceed to the third stage, which is to consider the amount of any award payable.

13. In **Gee v Shell UK Limited [2003] IRLR 82**. The Court of Appeal confirmed that that costs are the exception rather than the rule and that costs do not follow the event in Employment Tribunals.

14. In **McPherson v BNP Paribas [2004] ICR 1398**. In determining whether to make an order under the ground of unreasonable conduct, a Tribunal should take into account the "nature, gravity and effect" of a party's unreasonable conduct.

15. In **Barnsley Metropolitan Borough Council v Yerrakalva [2012] ICR 420** - "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 had."

16. Jilley v Birmingham and Solihull Mental Health NHS Trust

UKEAT/0584/06/DA, it was determined that if a Tribunal decided not to take account of the paying party's ability to pay, it should say why. If it decides to take into account ability to pay, it should set out its findings about ability to pay, say what impact this has had on its decision to award costs or on the amount of costs, and explain why.

17. I remind myself that here may be cases where for good reasons 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.

Submissions

18. I have heard brief oral submissions from Mr Chapwanya on behalf of the claimant that costs in this case should follow the cause. I have considered too the submissions made by Dr Mavaza as detailed in his written response to the application and supplemented in oral argument.
19. I have reminded myself of the reasons given for the determination on 31 January 2022 of the Preliminary application that I should consider the First Respondent's application to be granted an extension of time to present a response to the complaint out of time. The application was refused. Contrary to the assertion made by Mr Chapwanya's that the claimant's application to strike out the response presented by the First Respondent was successful it must be remembered that the response submitted by the First Respondent had not been presented in the prescribed form. The response from the First Respondent was never presented and the claimant's application to strike out the response was never determined in those terms a valid response never having been presented.
20. The history to the progress of this case has been unfortunate due in no small part to the necessity to conduct the hearings remotely by CVP and telephone. Costs are sought in respect of the hearing on 15 December 2021 and on 31 January 2022.
21. The hearing originally listed in December 2021 to determine the preliminary issue of the First Respondent's application to present a response out of time was postponed. Dr Mavaza who represents the First Respondent attended the hearing albeit he reported he was unwell having had a reaction to his Covid-19 booster vaccine, he stated he was not fit to continue on the day. That Dr Mavaza was unfit to conduct the hearing was not challenged by Mr Chapwanya and in the circumstances the hearing which was conducted by CVP was postponed to 31 January 2022.
22. Dr Mavaza, who is a law graduate, a lawyer but not a solicitor, has experience advising on Employment and Immigration law as a consultant in the UK, represents the First Respondent pro bono as a member of the congregation and Elder of the Wolverhampton church. Dr Mavaza states that he was not informed of the hearing until 9 December 2021 when he had not been able to contact the main witness for the respondent who was out of country in Zimbabwe to take instructions and had been unable to adequately prepare for the hearing. In light of the narrative and Dr Mavaza's ill health on the day, the hearing was postponed to 31 January 2022.
23. At the hearing on 31 January 2022 the respondent's application for an extension of time was not successful and the First Respondent was informed

- that they shall have no right to make further representations on the merits of the complaint, save for remedy if applicable.
24. In answer to the application for costs Dr Mavaza asserts that the respondent has not acted in a manner that is vexatious, abusive, disruptive or otherwise unreasonable in the conduct of the response.
25. Although Mr Chapwanya makes the application for costs on the basis of the application contained in the E-bundle pages 107-108 as there is no response accepted to be struck out I have considered the application in the basis that the Tribunal rejected the First Respondent's response and that in seeking an extension of time and the postponement of the hearing on 15 December 2021 the respondent conducted the litigation and their response to it in a manner in breach of Rule 76 (1)(a), (b) or (c).
26. Sadly, it would appear that the First Respondent has relied upon assistance from a member of the congregation whose business is that of a sole practitioner providing employment advice. While taking instructions from a committee or board of trustees is never easy sadly the engagement that Dr Mavaza has had with the tribunal procedures has not been timely and well considered. I am conscious that in contrast the claimant is ably represented by Mr Chapwanya. I am asked to determine that the need for the claimant to engage with the applications made by the First Respondent at hearings on 15 December 2021 and 31 January 2022 and the postponement of the hearing on 15 December 2021 amounts to conduct which falls within the range of Rule 76(1).

Determination

27. I must remind Mr Mavaza that costs in the Employment Tribunal are the exception rather than the rule and do not at all follow the cause. This is not a case in which the merits of the defence proposed by the First Respondent, albeit not in the required form, can be said to be without any reasonable prospect of success. The merits of the claimant's complaints as they are alleged has not been tested in any hearing other than to the limited extent when considering the application to extend time.
28. The First Respondent had asserted in their draft response, which was not accepted by the tribunal, that the claimant had not particularised her complaints and sought further particulars in the absence of which her complaint should be struck out. Notwithstanding a number of opportunities to do so the First Respondent did not present a response to the complaints in the prescribed form and as a result the application for an extension of time was not granted. The claim proceeds for the Tribunal to determine the merits of the claim and any remedy against the First Respondent.
29. It having been determined that it was necessary to postpone the hearing scheduled for 15 December 2021 the time spent in preparation for that hearing was reasonably incurred. That the application of the First Respondent for an extension of time was not granted did not make the application and the hearing of it a demonstration of vexatious, abusive, disruptive or otherwise unreasonable in the conduct of the response.

30. While it is unfortunate that the hearing on 15 December 0221 was postponed on the day due to Dr Mavaza's poor health that is not considered in the circumstances to be the fault of the claimant. Dr Mavaza is a sole practitioner, for want of a better description, and to have refused the postponement application would, on the balance of convenience, have prejudiced the First Respondent.
31. The decision not to allow the application for an extension of time to present a response was made as a result of the First Respondent's failure to comply with the procedural directions for conduct of a defence. There is nothing before me that leads me to conclude that this is a case in which the First Respondent has acted in a way described at Rule 76(1)(a) or(b). The circumstances of the postponement on the day do not cause me to find that the First Respondent has behaved in a way to require me to make a costs order.
32. Notwithstanding my decision that a costs order is not made in this case, I have noted also that the means of the First Respondent are limited and were I to have considered this to be a case in which a costs order may be made I would have taken their means into account and have determined that a costs award in the circumstances would not be made.

Employment Judge Dean
23 January 2024

Public access to employment tribunal decisions

Judgments (apart from judgments under rule 52) and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.