

REASONS

1. By letter dated 17 November 2023, the Respondent applied for its costs of the proceedings pursuant to Rule 76(1)(a) of the Tribunal's Rules of Procedure on the grounds that the Claimant had acted vexatiously, abusively, disruptively, or otherwise unreasonably in bringing or conducting the proceedings, or a part of them.

Background

2. The following summary is taken from the Respondent's letter of application and is uncontentious in its description of the essential background.
3. The Claimant was employed by the Respondent as a Senior Financial Planning and Reporting Manager. His employment began on 17 June 2013 and ended on 1 December 2021 by reason of redundancy following an organisational restructure.
4. On the Respondent's case, the Claimant forfeited his right to a redundancy payment after rejecting two roles considered to be suitable alternative employment. The Claimant then filed his claim with the Tribunal on 22 April 2022 claiming unfair dismissal and a redundancy payment.
5. The first Preliminary Hearing in this matter was arranged for 13 March 2023. The case management orders made at this hearing included the direction that, by 10 April 2023, the parties must send each other copies of all documents relevant to the issues listed in the Case Summary. The Claimant must include documents relevant to financial losses.
6. On receipt of the Claimant's documents, the Respondent made a request for specific disclosure on 17 April 2023. The request related to his new role and other roles he had applied to following his dismissal. This was relevant to the Claimant's claim that he was entitled to a contractual redundancy payment, and in particular whether the eligibility requirements as set out in his contract had been fulfilled. The Claimant failed to provide this information despite repeated requests, indicating that he no longer had possession of the documents.
7. The Respondent sought an order on 8 June 2023 compelling the Claimant to obtain the documents and to disclose them as part of these proceedings. This was granted by the Tribunal on 13 June 2023, giving the Claimant until 20 June 2023 to provide these. The date for exchange of witness statement was also extended by 4 weeks to allow time for these to be considered.
8. When the Claimant failed to comply with this order, the Respondent wrote to the Tribunal on 22 June 2023 seeking an order that the claim be struck out unless the Claimant provided the documents in the next 7 days.

9. On 14 July 2023, the Respondent wrote to the Tribunal asking that the first day of the Final Hearing (4 September 2023) to be converted to Open Preliminary Hearing to determine its application for an Order striking out the claim for non-compliance and/or on the basis that the claim has not been actively pursued.
10. The Respondent issued the Claimant with a costs warning on 9 August 2023. The Respondent wrote to the Tribunal again on 10 August 2023 seeking its intervention.
11. The Tribunal wrote to the Claimant on 23 August 2023 seeking his response to the claim being struck. When the Claimant failed to respond the Tribunal wrote to both parties on 31 August 2023 confirming the claim had been struck out.

The Respondent's application

12. In the light of the procedural history set out above, the Respondent submits that the Claimant's conduct in preparing for the hearing has been vexatious, abusive, disruptive and unreasonable.
13. The Respondent contends that the Claimant's continued failure to provide the documents placed the parties on an unequal footing and severely prejudiced its ability adequately to prepare for the final hearing, which had been listed to be heard between 4 to 6 September 2023. The Respondent says that it was required to carry out significant preparation for the final hearing including preparing witness statements and a hearing bundle that was filed with Tribunal on 22 August 2023.

Amount of Costs sought.

14. As its primary position, the Respondent asked the Tribunal to order that the Claimant should pay £19,205.20, representing the totality of the costs it incurred since the start of this claim, as detailed in a Schedule of Costs annexed to its application.
15. In the alternative, the Respondent requested an order that the Claimant pay at least £5,353.40 of the Respondent's costs in the claim, representing the costs incurred from the costs warning on 9 August 2023 to date, together with counsel's fee for attending the costs hearing.

The Claimant's submissions

16. The Claimant did not dispute the Respondent's account of the procedural history and apologised for his non-compliance with the Tribunal's orders. He pointed to the fact that he was not legally trained.
17. He stated to the Tribunal that he believed he had a genuine case. In the past, his health had suffered through long covid. The Claimant did not however contend that he was medically impeded from complying with the orders of the Tribunal or engaging properly in the proceedings. The Claimant instead

maintained that he did not have time to read emails related to his claim as he was concentrating so hard on his work.

18. The Claimant stated that he missed the relevant Tribunal correspondence and believed that the hearing would proceed. He was devastated when he read the email of 31 August 2023 notifying him that his claim had been struck out.
19. The Claimant secured his current employment in August 2023, working as a freelance business partner. Since starting, he has tended to work a five day week and has had two short spells of sick leave. His work demands close attention to matters of complex detail.
20. The Claimant's gross salary is around £77,000. His wife is in paid employment, working in an administrative role in the civil service. They rent their home and have a son at university, whose expenses they contribute to.

Guidance

21. The Tribunal is required to apply a three-stage test:-
 - (i) first, it must ask itself whether a party's conduct falls within rule 76(1)(a) — in other words, whether, on the facts before it, the Tribunal's costs jurisdiction is engaged.
 - (ii) if it is, then secondly, the Tribunal must go on to ask itself whether it is appropriate to exercise its discretion in favour of awarding costs against that party.
 - (iii) the third stage is the determination of the amount of any award.
22. The case law emphasises that it is appropriate for a litigant in person to be judged less harshly in terms of his conduct than a litigant who is professionally represented. Justice requires that tribunals do not apply professional standards to lay people, who may well be embroiled in legal proceedings for the only time in their life. Lay people are likely to lack the objectivity and knowledge of law and practice brought to bear by a professional legal adviser.
23. In determining whether to make an order under this ground, a tribunal should take into account the '*nature, gravity and effect*' of a party's unreasonable conduct. It was important not to lose sight of the totality of the circumstances. The vital point in exercising the discretion to order costs is to look at the whole picture.
24. The tribunal has to ask whether there has been unreasonable conduct by the paying party in bringing, defending or conducting the case and, in doing so, identify the conduct, what was unreasonable about it, and what effect it had. A persistent failure to provide information is an example of what may be held to be unreasonable conduct justifying a costs award.

25. Where a tribunal has found that a party has conducted proceedings unreasonably, it must examine carefully what costs are attributable to that unreasonable conduct. Consideration must also be given to the paying party's means to satisfy an award.

Conclusions and Decision

26. The Tribunal is in no doubt that its jurisdiction to award costs is engaged in this case. The Claimant's failure to comply with case management directions and ultimately to respond to correspondence from the Tribunal giving notice that his claim was at risk of being struck out was undoubtedly unreasonable conduct in the proceedings. It had the consequence of substantial costs being needlessly incurred in the defence of the claim. The Claimant should have appreciated that his failure to engage in the proceedings and to provide the disclosure he had been directed to produce would significantly prejudice the Respondent's ability to prepare its defence to his claims.
27. Turning to the issue of whether it should exercise its discretion to award costs in this case, the Tribunal has had regard to the Claimant's status as a lay person representing himself in the proceedings and makes due allowance for that fact.
28. The Tribunal does not consider that the Claimant has not shown any convincing explanation as to why he unable, whether for reasons of ill health or otherwise, to comply with the Tribunal's directions. It notes that he had the wherewithal to apply for and secure responsible and reasonably well remunerated work during the period when he was required to engage in these proceedings. The Claimant's suggestion that he was distracted from considering emails related to his claim is implausible and the Tribunal does not accept it. The Tribunal concluded that the Claimant wilfully disengaged from the proceedings, oblivious to the fact the Respondent was being put to significant cost in continuing its case preparations. Having regard to all the circumstances, the Tribunal considers that the making of a costs award is justified in this case.
29. Although there is a case for the making of a higher award in this case, the Tribunal considers that a fair and proportionate assessment should include the costs incurred by the Respondent following their costs warning letter, together with their costs of attending the costs hearing, comprising counsel's fee of £1,500. From its review of the Respondent's schedule of costs, the Tribunal is satisfied that the costs claimed represent an appropriate level of expenditure for a claim of this character and complexity. The Tribunal has considered the Claimant's means and ability to satisfy such an award and takes these factors into account in determining the amount of costs awarded.
30. Added together, the award is therefore £5,353.40 plus £1,500 giving a total of £6,853.40.

Case Number: 2201961/2022

Employment Judge Sutton KC

13 March 2024

Sent to the parties on:

22 March 2024

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For the Tribunal Office:

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