EMPLOYMENT TRIBUNALS

Claimant: Miss L Singh
Claimant by respondent's contract claim: Optimal Claim Limited (t/a Optimal Solicitors)

Respondent: Optimal Claim Limited (t/a Optimal Solicitors)
Respondent to respondent's contract claim: Miss L Singh

Heard at: Manchester; on the papers **On:** 2 April 2024

Before: Employment Judge Holmes (sitting alone)

Representatives
For the claimant: Written representations
For the respondent: Written representations

COSTS JUDGMENT

It is the judgment of the Tribunal that:

The claimant's application for costs was made out of time, and the Tribunal does not grant any extension of time for the application to be made. It is dismissed.

REASONS

1. By a claim form presented to the Tribunal on 18 March 2022 the claimant brought claims for notice pay, unlawful deductions from wages, and holiday pay. She resigned from her employment with the respondent on 13 December 2021, and claimed that she was constructively dismissed. The respondent defended the claims, and brought an employer's contract claim against the claimant.

2 By a reserved judgment sent to the parties on 17 March 2023 the claimant's claims succeeded, and the respondent's contract claim was dismissed.

3. By a letter to the Tribunal dated 13 September 2023, the claimant made an application for costs against the respondent. The respondent responded to the application by written representations of 11 December 2023.

4. Both parties agreed to the application being determined on the papers, and the Employment Judge has accordingly done so. There was an agreed bundle for the costs hearing, and reference to page numbers are accordingly to that bundle.

The application and the response – initial time limit issue.

5. The application is set out in an undated document (pages 44 to 50 of the bundle). The claimant , who is a solicitor, but who was represented at the final hearing by counsel, seeks costs, or a preparation time order, against the respondent on grounds (1)(a) and (1)(b) of rule 76. In particular , the claimant relies upon breach of a case management order, in relation to disclosure, and unreasonable conduct of the proceedings. Whilst undated, the application was received by the Tribunal on 13 September 2023.

6. The respondent's written representations take the initial point that the application has been made out of time, citing rule 77. The Tribunal will accordingly address that issue at the outset.

Rule 77.

7. The provisions of rule 77 are as follows:

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.

8. The chronology of the judgment and subsequent applications is as follows. The reserved judgment was sent to the parties on 17 March 2023. The respondent made application for a reconsideration (unfortunately also undated) which was received on 31 March 2023 (pages 22 to 31 of the bundle). That application was rejected by letter from the Tribunal of 30 August 2023 (pages 32 to 34 of the bundle). The respondent appealed to the Employment Appeal Tribunal (again, the Grounds of Appeal are undated, at pages 35 to 39 of the bundle, and are erroneously dated 27 March 2024 in the Index to the bundle) , and by letter dated 24 October 2023 the appeal was rejected on the "sift" by the EAT (pages 40 to 43 of the bundle).

9. The first question therefore is when was "the judgment finally determining the proceedings" for the purposes of rule 77?

10. The respondent's submission is that the rules required the application to be made within 28 days of the judgment being sent to the parties. As is submitted, as the judgment was sent to the parties on 17 March 2023, the time limit for making the application expired on 14 April 2023. It was not made until 13 September 2023, just under 5 months out of time.

11. The claimant has not replied to this submission, which is a little surprising, given that she is a solicitor, has access to employment counsel, and is clearly able to conduct legal research.

12. On the face of matters, the respondent's contention that the application is out of time is correct. That, however, may not be as straightforward a conclusion as first

appears. That is because the respondent , firstly, applied for, unsuccessfully, reconsideration, and then, also unsuccessfully, appealed.

13. Being made as it was on 13 September 2023 the claimant's application for costs was made within 28 days of the rejection of the application for reconsideration, and, in fact, before the rejection of the respondent's appeal to the EAT.

14. The question therefore is what is the effect of either the reconsideration application, or then the appeal , upon the time limit for the making of an application for costs?

15. Save for the respondent's submissions, neither party has addressed these specific issues, but the starting point must be the wording of the rule itself. It refers to time running from the date of *the judgment finally determining the proceedings.*

16. Was the rejection of the respondent's application for reconsideration a judgment which finally determined the proceedings? In the view of the Employment Judge it was not. The application was considered by the Employment Judge under rule 72(1) of the 2013 rules of procedure, which provides:

(1) The Tribunal shall consider any application made under rule 71. If the Tribunal considers that there is no reasonable prospect of the original decision being varied or revoked (including, unless there are special reasons, where substantially the same application has already been made and refused), the application shall be refused and the Tribunal shall inform the parties of the refusal. Otherwise the Tribunal shall send a notice to the parties setting a time limit for any response to the application by the other parties and seeking the views of the parties on whether the application can be determined without a hearing. The notice may set out the Tribunal's provisional views on the application.

17. Thus, where the Tribunal has exercised its powers under rule 72(1) in this way, there is no judgment , and the Tribunal's letter dated 30 August 2023 is not (although it is described as such in the Index) a judgment. It is merely , as the rule requires, the Tribunal informing the parties that the application for reconsideration has been refused.

18. On that basis the Tribunal's letter of 30 August 2023 cannot be regarded as the judgment finally determining the proceedings, and so the time for making an application for costs cannot run from that date.

19. That leaves the appeal. Does the rejection of the appeal by the EAT under the sift procedure amount to a judgment finally determining the proceedings? At first blush, the answer would appear to be in the negative, for similar reasons that apply to the rejection of the reconsideration application. Again, there is no judgment, the appeal was rejected under rule 3(7) of the Employment Appeal Rule 1993, which provides:

(7) Where it appears to [the Appeal Tribunal] or the Registrar that a notice of appeal or a document provided under paragraph (5) or (6)—

(a) discloses no reasonable grounds for bringing the appeal; or

(b) is an abuse of the Appeal Tribunal's process or is otherwise likely to obstruct the just disposal of proceedings,

the Appeal Tribunal or the Registrar shall notify the Appellant or special advocate accordingly informing him of the reasons for its opinion and, subject to paragraph (10), no further action shall be taken on the notice of appeal or document provided under paragraph (5) or (6).

20. Thus, rather as with rule 72 of the Employment Tribunal's rules, under rule 3(7) no judgment is issued, the appellant is notified to the EAT's opinion and that no further action shall be taken on the appeal.

21. The only exception to this that the Employment Judge has been able to locate is where the EAT issues a judgment , and that then finally determines the employment tribunal proceedings. This is what occurred in ***Soll (Vale) v Jaggers UKEAT/2018/16/DA*** . In that case the Employment Tribunal had conducted a hearing on liability only, with remedy to be determined at a later date. In determining liability for constructive dismissal in the claimant's favour however, it made findings that would lead to no potential deduction being made for the chance that the claimant would have been fairly dismissed in any event, on the basis of ***Polkey*** . The respondent appealed the liability judgment in that regard, and the EAT upheld the appeal, finding that the claimant would inevitably have been dismissed in any event, so would only receive a nil award. On that basis , no remedy hearing was required.

22. In rejecting an argument that the effect of the EAT's judgment was not finally to determine the proceedings, so that any costs application had to be made within 28 days of the Tribunal's original judgment HHJ Eady QC (as she then was) said this:

*" **Costs before the ET***

22. The first question raised relates to the application for costs before the ET, that is: whether the Respondent is able to make an application for its costs in the ET proceedings given that this was made outside the 28-day time limit as calculated from the last ET Judgment.

23. Accepting that "proceedings" in Rule 77 of the ET Rules refer to proceedings in the ET and not the EAT, in setting aside the ET's Judgment and substituting my own finding that there should be a nil award in this case, I was exercising the power conferred on the EAT by section 35(1) of the ETA and thus exercising the powers of the ET; it was my Judgment that finally determined the ET proceedings for the purposes of Rule 77. The Respondent has made its application for costs in those proceedings - made both to the EAT and the ET - within the required 28-day time period.

24. In reaching this view, I consider it is supported, not undermined, by the definition of "judgment" at Rule 1(3) of the ET Rules. That definition clearly distinguishes between proceedings and the individual Judgments that might be given in those proceedings, which might be on liability, remedy or costs, or a combination of any of those. In the present case, the ET's Judgment had not determined the proceedings before it because it was still due to hold a Remedy Hearing. It was my Order which disposed of any need for a Remedy Hearing and thus, absent any appeal to the Court of Appeal, finally determined the proceedings."

23. Thus, in those , very specific , circumstances, a judgment of the EAT did finally determine the tribunal proceedings. That, however, the Employment Judge considers, is a rare instance where the EAT did so, and in any event, there was in that case, as there is not in this, a judgment of the EAT.

24. The Employment Judge is therefore quite satisfied that neither the application for reconsideration nor the appeal to the EAT had the effect of delaying the time limit in which the claimant was required to make her application for costs beyond 28 days from when the Employment Tribunal's judgment was sent to the parties.

25. The respondent's contention that the application has been made out of time is thus correct.

Extension of time.

26. Rule 77 makes no provision for extension of the 28 day time limit (whereas its predecessor , rule 38(7) of the 2004 rules, did). Rule 5 of the 2013 rules, however, does give the Tribunal power , either of its own initiative, or upon application, to extend or shorten any time limit specified in the rules.

27. The claimant has made no application to extend time, and indeed, has not responded at all to the time limit issue.

28. The Tribunal has considered whether it should, even without an application from the claimant , extend time for the claimant to make her application for costs.

29. The Tribunal does not consider that it should grant any extension of time of its own motion. The respondent clearly objects, and points out that the claimant has provided no explanation for the delay.

30. The relevance and significance of absence of any reason for the delay being provided by the party seeking an extension of time has been much considered in the analogous jurisprudence on extensions of time on the just and equitable basis for discrimination and similar claims.

31. Whilst there had been a view that absence of an explanation for the delay would be fatal to an application for an extension of time, that view was considered and examined by the EAT in ***Concentrix CVG Intelligent Contact Ltd v Obi 2023 [ICR] 1***. The upshot of this review of the caselaw was that it would be an overstatement to say that absence of an explanation for any delay would always be fatal to an application for an extension of time, the length of and reasons for any delay were likely to remain highly relevant factors that a Tribunal would be likely to have to consider in exercising its discretion.

32. In ***Polystar Plastic Ltd v Liepa [2023] EAT 100*** Eady J. , now President of the EAT, endorsed the view that a Tribunal which did not expressly address the reasons for a delay could not demonstrate that it had correctly exercised its discretion, suggesting that a Tribunal would normally need to know at least what the reasons for the delay were before it could go any further.

33. As observed, however, there is no application to extend time, so this discussion is somewhat academic. It does, however, reinforce how inappropriate it would be for the Tribunal to consider granting an extension of time of its own motion, and it will not do so.

34. The Tribunal also takes into account (as it would had there been any application before it) that the claimant is a solicitor. Further, her application for more than a preparation time order , where she would be restricted to the hourly rate recoverable by litigants in person, is predicated upon her being a solicitor. She invokes and relies upon what she refers to as the "Chorley Principle", based upon the judgment in ***London Scottish Benefit Society v Chorley [1884] 13 QB 872*** to the effect that a solicitor representing themselves is entitled to recover the same costs as if they had employed a solicitor. She cites other cases in support of this principle, but the relevant point for this discussion is that the claimant is seeking to recover costs as a solicitor with "the necessary skill and experience" (page 5 of her application, page 48 of the bundle).

35. To the extent that the claimant seeks to be treated differently from a litigant in person in the awarding of costs , the Tribunal would be highly likely also to take that distinction into account in deciding whether to exercise its discretion to extend any relevant time limit for making her costs application.

36. The simple position, however, is that the claimant's application for costs was made well outside the time limit prescribed by the rules for doing so, there is no application before the Tribunal to extend the time for making the application, and no basis for the Tribunal to consider granting the application of its own motion. The claimant's application for costs is accordingly dismissed.

Employment Judge Holmes
DATED: 2 April 2024

JUDGMENT SENT TO THE PARTIES ON

19 April 2024

FOR THE TRIBUNAL OFFICE

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