



EMPLOYMENT TRIBUNALS

Claimant: Mr Mohamed
Respondent: Everycloud Securities Limited
Heard at: London South, by CVP **On:** 31 January 2025
Before: EJ Rice-Birchall

Representation
Claimant: In person
Respondent: Mr Richards, Director

ORDER

The claimant is ordered to pay costs to the respondent in the sum of **£1314**.

REASONS

Background

1. The respondent made a costs application under rule 74 of the Employment Tribunals Rules of Procedure 2013 (ET Rules).
2. It alleged that the claimant acted unreasonably in both bringing proceedings against the respondent and also in his conduct in the proceedings under rule 76(1)(a) of the ET Rules.

Facts

The claim

3. The claimant worked between July and September 2020 for the respondent as a contractor. The respondent later suggested the claimant develop software under a grant scheme which required the claimant to be an employee rather than a contractor. Accordingly, the claimant started working for the respondent as a project manager on 1 October 2020.
4. The claimant resigned with immediate effect on 19 January 2021.
5. He brought a claim on 14 May 2021 in which he averred that he was forced to resign “*due to my reluctance to participate in the fraud and me whistleblowing and the [] unpleasant work environment.*”

6. It is notable that the response to the claim does not set out that it considered that the claim had been issued out of time.

February PH

7. A first preliminary hearing (PH) was held on 28 February 2023 before EJ Krepski. The claimant significantly clarified his claims at that hearing. Nonetheless, the respondent stated its intention to make strike out application and a further preliminary hearing was listed for 27 June 2023 (the June PH).
8. It transpired during the first Preliminary Hearing on 28 February 2023 that the claimant was abroad.
9. The case management orders dated 28 February 2023 (at which the June PH was set), include paragraphs 7 and 8 in which the Tribunal ordered the claimant to seek permission to give evidence from abroad if he could not be in the UK to attend the June PH. It explained (and emphasised) that obtaining permission could take several months to obtain and that any application should be made as soon as possible.
10. Notably, the list of issues which was completed at the preliminary hearing did not identify that time limits were an issue to be determined by the Tribunal.

Postponement application

11. On 23 June 2023, less than 7 days before the June PH, the claimant applied for the June PH to be postponed explaining that he was outside of the UK and unable to attend the hearing. He failed to provide any additional reasons. This was despite the claimant having been informed at the last preliminary hearing of the need to make arrangements and seek permission to give evidence from abroad.
12. The claimant provided additional information on 25 June 2023.
13. On 26 June 2023, the claimant's application for a postponement was refused on the basis that he had not provided adequate reasons for the short notice application and that it had been made clear at the last hearing that he needed to be in the UK for the hearing.
14. The claimant reiterated his application later on 26 June 2023, but that application contained no material new information and so the decision to postpone stood. The claimant emphasized his "intent to appeal any decision to proceed with the hearing in my absence." He explained that the reason for requesting the postponement was related to the health of a terminally ill family member. No medical evidence was provided.
15. Despite his postponement application having been rejected, the claimant failed to attend the June PH.

Deposit order

16. At the June PH, a deposit order was issued after Employment Judge Bryant

KC concluded that the claimant's constructive unfair dismissal (whistleblowing) claim had little reasonable prospect of success.

17. The claimant paid the £100 deposit required and elected to continue with his claims against the respondent.
18. The respondent's application to strike out the claimant's claim was dismissed. No written reasons were available for that decision.

The June PH

19. It was identified, at the June PH, that the claimant's claim appeared to have been issued outside the primary time limit. The claimant was ordered, by no later than 4pm on 1 September 2023, to "send to the respondent and to the tribunal a written explanation as to why his ET1 claim form was not presented to the tribunal until 14 May 2021 and, if this is his case, why it was not reasonably practicable to have presented it before then".
20. Other case management orders were varied at the preliminary hearing as follows:
 - “4.1 The date for the Claimant to send a Schedule of Loss to the Respondent and to the Tribunal as set out in paragraphs 12 and 13 of the February CMOs is varied to **1 September 2023**.
 - 4.2 The date for disclosure of documents by the Claimant and the Respondent as set out in paragraphs 14 to 16 of the February CMOs is varied to **26 January 2024**.
 - 4.3 The date for a file of documents to be agreed as set out in paragraph 17 of the February CMOs is varied to **23 February 2024**.
 - 4.4 The date for the file of documents to be prepared by the Respondent and sent to the Claimant as set out in paragraph 18 of the February CMOs is varied also to **23 February 2024**.
 - 4.5 The date for exchange of witness statements as set out in paragraph 26 of the February CMOs is varied to **6 September 2024**.”
21. The claimant failed to comply with these deadlines or to progress his case at all until the respondent wrote to him on 23 January 2024 to remind him of the case management orders. In its email of 23 January, the respondent also pointed out to the claimant that whilst it had begun to collate its disclosure in order to comply with the case management orders, it could not complete that disclosure exercise until the claimant had complied with his obligations. It suggested an extension to the timetable to allow the claimant to complete his schedule of loss and his explanation as to why he had submitted his claim form late.
22. The claimant provided his Schedule of Loss on 28 January 2024, almost five months after he had been ordered to do so. He failed to provide an explanation for why his claim was issued out of time until 5 February 2024, at which time the claimant also wrote to the Tribunal to complain that the respondent had "significantly impeded the progression" of his case, and that their conduct, "characterized by communication delays and a disregard for previously agreed procedural conditions," had substantially hindered the preparation of his case. In fact, the respondent had requested the claimant to agree to an extension to the disclosure deadline by three weeks in light

of the claimant's own significant non-compliance.

23. On 23 February 2024, the respondent made an application to strike out the claimant's claim on the basis that it was out of time.
24. At a hearing on 21 March 2024, the claimant's claims were struck out on the basis that they were not presented within the applicable time limit and it had been reasonably practicable to do so. The claimant appealed that decision to the EAT but his appeal was unsuccessful.

The claimant's means

25. The claimant gave oral evidence to the Tribunal about his means. He said he had not worked since the date his employment with the respondent terminated in January 2021. He said that he owned a house but because he was in arrears with his mortgage the mortgage company effectively managed the property and took any rental income from it. Further, although he had had tenants they had left and he didn't have the money to refurbish the property.
26. The claimant explained that he had been living off his girlfriend since the termination of his employment.
27. The Tribunal did not accept that the claimant had unable to find work since January 2021. There was no evidence of applications made and/or rejections and no evidence of the scope of jobs the claimant had applied for.

The respondent's application

Rule 76(1)(c)

28. The respondent says that the June PH could not fully proceed as intended because the claimant failed to attend, notwithstanding that the claimant was advised that if he was going to be abroad, he would need to seek permission to give evidence. The claimant failed to do this and instead applied for the June PH to be postponed with less than 7 days' notice.
29. While the June PH continued (and the Deposit Order was made), the hearing could not take place as planned. Had it not been for the claimant's unreasonable behaviour, his claims could have been struck out on 27 June 2023 as opposed to 2 April 2024 (in particular, he could have given evidence about his out of time claim then). The respondent's position is that, as a result, the claimant's actions in the run up to the June PH were disruptive and unreasonable within the meaning of rule 76(1)(a) of the ET Rules.
30. In addition, the respondent believes that costs should be awarded under rule 76(1)(c) on the basis that a hearing was effectively postponed (in the sense that the respondent's application for strike out could not be fully considered and the claimant could not give evidence about his claim being submitted) at less than 7 days' notice.

Other grounds

31. The respondent alleges that the claimant has acted unreasonably throughout these proceedings and believes that costs should be granted on the basis that the claimant's claims had no reasonable prospect of success (rule 76(1)(b) of the ET Rules).
32. At the June PH, it was determined that the claimant's claims had little reasonable prospect of success. However, the respondent argues that it is now clear that, had the June PH proceeded, it could have been determined that the Tribunal had no jurisdiction to hear the Claimant's claims as they were submitted out of time and there was no reason why it was not reasonably practicable for the claimant to submit his claims within the required time limit i.e. as has been demonstrated by the Judgment striking out the claim.
33. The claimant issued his claim on 14 May 2021. While (due to the claimant's actions) his claim was not struck out until 2 April 2024 i.e. after nearly three years, from the beginning, the claimant had no reasonable prospect of success in that he had no lawful basis to submit his claims out of time.
34. The respondent argues that the manifest weaknesses in the claimant's claims are set out concisely in the deposit order, and that it believes that the Tribunal could have found that the claimant's claims had no prospect of success had the claimant been able to give evidence.
35. The respondent alleges that the only reason that the claim continued was because of the claimant's unreasonable behaviour in ignoring directions and failing to make himself available to give evidence.
36. While the respondent's position is that the Tribunal never had jurisdiction to hear the claimant's claims, he was given multiple opportunities to both put his case forward (and to withdraw it). Unfortunately, the respondent has spent a substantial sum defending a claim that never had prospects. This process has continued for almost three years due to the claimant's own unreasonable behaviour. In the circumstances, the respondent believes that it should be entitled to full recovery of its costs.

Overriding objective

37. The respondent believes that this application is in accordance with the overriding objective in that:
 - a. It ensures that the parties are on an equal footing – the respondent has spent a substantial sum defending itself and, despite his unreasonable behaviour, the claimant has spent nothing;
 - b. It deals with the case in a way that is proportionate to the complexity and importance of the issues. The ET Rules allow for costs to be awarded in the circumstances and the respondent believes that it is proportionate given the claimant's unreasonable behaviour;
 - c. Given the claimant's behaviour, the respondent believes that it is fair and just that the costs of litigation should not be borne exclusively by the respondent (which is currently the case).

The Respondent's costs

38. The Respondent's costs amount to £17,298 plus VAT. This is made up of £14,000 plus of solicitors' fees (which the respondent's solicitors say have been heavily discounted as they did not consider it fair that the respondent should have to incur extensive costs due to the claimant's behaviour) and £3,298 of disbursements (primarily counsels' fees). The respondent's solicitors invoice dated 31 March 2024 was made available.

The claimant's application

39. At the outset of the hearing, the claimant made an application to strike out the respondent's response on the basis that the respondent had failed to comply with an order of the Tribunal as it had disclosed documents four weeks later than the due date.

40. For reasons given orally at the hearing, the claimant's application was unsuccessful. The claimant was informed of his right to request written reasons.

Law

41. Rule 74 states as follows:

2) The Tribunal must consider making a costs order or a preparation time order 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 of it, or the way that the proceedings, or part of it, have been conducted,

(b) any claim, response or reply 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 that hearing begins.

42. The approach a tribunal is to take when considering making a costs order under rule 74 of the Tribunal Rules is as follows:

- The first stage of the test (the threshold test) is an objective one. For example, did the claim or defence, in fact, have no reasonable prospect of success at the start of the litigation, even though the party did not realise it at the time.
- The second stage of the test (when the tribunal exercises its discretion) is subjective. For example, at the time, did the party know, or ought they have reasonably known, that its claim or defence had no reasonable prospect of success.
- When considering these questions, the tribunal must be careful not to be influenced by the hindsight of taking account of things that were not, and could not have reasonably been, known at the start of the litigation. However, it may have regard to any evidence or information that is available to it when it considers these questions, and which casts light on what was, or could reasonably, have been known, at the start of the litigation.

43. Where the case falls into a category in which costs may be awarded, case law has emphasised that the tribunal has a wide and unfettered discretion.
44. The Tribunal must not judge a litigant in person by the standards of a professional representative.
45. The courts have repeatedly emphasised that costs in the Employment Tribunal are the exception not the rule, but that is on the basis that the costs regime in the Rules is tightly circumscribed and costs do not follow the event. There is no authority for any additional general test of exceptionality.
46. The extent to which a party has sought or obtained legal advice may be a relevant factor, but the fact that they have taken and acted on advice does not necessarily insulate them from a costs order.
47. The Tribunal may have regard to the paying party's ability to pay in deciding whether to make a costs order (Rule 84). If a party asks for its means to be considered, however, the Tribunal should state whether and how it has done so. The means of the paying party are also likely to be a relevant factor in determining the amount of the costs order.
48. It is well established that an award of costs should be compensatory not punitive. Costs should be limited to those "reasonably and necessarily incurred".
49. When having regard to a party's ability to pay the Tribunal should balance that factor against the need to compensate the other party who has unreasonably been put to expense. The former does not necessarily trump the latter, but it may do so.
50. The amount of compensation ordered may be relevant to the claimant's ability to pay.

Deposit orders

51. If a deposit is paid in accordance with the order, there may be implications for the depositor if at any stage after the deposit order has been made the tribunal decides the specific allegation or argument against them for substantially the same reasons as those in the deposit order.
52. Unless the contrary is shown, the depositor will be treated as having acted unreasonably in pursuing that specific allegation or argument, for the purpose of the tribunal considering whether to make a costs or preparation time order.
53. If an award for costs or preparation time is made against the depositor, the deposit will be paid to the other party or, if there is more than one, to such other party or parties as the tribunal orders.
54. However, unless the deposit is paid in accordance with these provisions it will be refunded to the depositor.

55. If a deposit is paid to a party under rule 40(7)(b) **and** a costs or preparation time order has been made against the depositor in favour of the party who has received the deposit, the amount of the deposit counts towards settlement of the costs or preparation time order.
56. Where a depositor has been found to have acted unreasonably in pursuing an allegation or argument following a deposit order, it will not automatically follow that a costs order will be made against them. Even where unreasonable conduct has been found, the tribunal has a discretion as to whether or not costs should be awarded, and to what amount, and must consider all relevant circumstances in exercising that discretion.

Conclusions

57. It is difficult to make relevant findings in circumstances such as this where there has been no final hearing as there are no findings on liability, disputed facts and/or the parties' credibility.

Deposit order

58. The costs consequences of the deposit order are set out in rule 40(7) and apply only when the Tribunal, following the making of a deposit order, decides the specific allegation or argument against the depositor for substantially the same reasons given in the deposit order. None of the reasons given for making the deposit order related to the claim being out of time, which was the reason for the claim being dismissed. The deposit must therefore be repaid to the claimant.
59. The respondent alleges that it was unreasonable behaviour within the meaning of rule 74(1)(a) for the claimant to have continued with his claims after the deposit order was issued and/or that the claims had no reasonable prospect of success.
60. The Tribunal finds that, having paid the deposit, the claimant's continuation of those claims could not be considered as unreasonable behaviour in circumstances in which those matters were not litigated and the reasons for the deposit order were not part of the final judgment.
61. Further, the Tribunal could not make findings that the claim had no reasonable prospect of success, when an application to strike out the claim had been considered, and rejected, on the basis that the claim had no reasonable prospect of success.

Has the claimant acted unreasonably in the way in which proceedings have been conducted?

Failing to attend the June PH

62. The respondent further alleges that the claimant acted unreasonably by failing to attend the June PH, despite his postponement application having been rejected.
63. The Tribunal finds that the claimant did act unreasonably in failing to attend the June PH and also by failing to make appropriate arrangements either to

be in the UK for the hearing or to obtain appropriate permissions to give evidence from abroad, in circumstances in which the claimant had been prewarned of the requirements upon him. The claimant's conduct showed disregard to the Tribunal's processes and procedures. However, contrary to the respondent's submission, there was no evidence before the Tribunal to demonstrate that, as a result of the claimant's non-attendance, the Tribunal could not fully consider the respondent's strike out application at the June PH.

64. First, there would be no need to take evidence before considering a strike out application. Second, there is nothing in the Record of Preliminary Hearing to suggest that the Employment Judge was unable to consider the strike out application because of the non-attendance of the claimant. It simply records: "The Respondent's application to strike out the Claimant's claim under s103A of the Employment Rights Act 1996 is dismissed." That does not suggest that the application was not considered, and, in any event, the Judge did make a deposit order.

65. Further, the Tribunal does not accept that the claimant's failure to attend the June PH caused any delay in the claim being struck out for being out of time. That issue does not appear to have been raised before the June PH and therefore would not have been dealt with at that hearing, as the claimant needed to be provided with time to explain the fact that he brought his application out of time.

Failing to comply with the orders set out in the CMOs made at the June PH

66. The respondent also alleges that the claimant acted unreasonably by failing to comply with the orders made at the June PH. Most importantly, the claimant was ordered, by no later than 4pm on 1 September 2023, to "send to the respondent and to the tribunal a written explanation as to why his ET1 claim form was not presented to the tribunal until 14 May 2021 and, if this is his case, why it was not reasonably practicable to have presented it before then".

67. The claimant failed to comply with this deadline. He failed to provide an explanation for why his claim was issued out of time until 5 February 2024, some 5 months later.

68. The Tribunal finds that the claimant acted unreasonably in failing to comply with the Tribunal's order. Notably, he also failed to comply with the order to provide a Schedule of Loss over a similar time frame.

69. This resulted in the respondent having to write to the claimant on 23 January 2024 to chase the claimant as it had had to start considering its own obligations under the case management orders to disclose documents.

Exercise of discretion

70. In considering whether to exercise its discretion to award costs, the Tribunal took into account the claimant's conduct and failure to comply with orders. The Tribunal finds that there was a general pattern of non-compliance by the claimant (failing to seek authority to give his evidence from abroad, failure to comply with deadlines, failure to attend a hearing

when postponement was refused) which the Tribunal considers was evidence of the claimant acting unreasonably in his conduct of the proceedings. The Tribunal finds that the claimant at no time offered any proper explanation for his failures and where he relied on the illness of a close relative, no attempt was made to provide medical evidence.

71. However, the Tribunal finds that the impact on the respondent of the claimant's unreasonable behaviour is primarily the period around 23 January 2024, when the claimant had to write to chase the claimant to comply with the orders. That impact was therefore from the date of the claimant's non-compliance around September 2023 until the date the respondent had all the information it needed to make its application on 23 February 2024 to strike out the claim on the basis that it was out of time. The Tribunal does not accept that the claimant's unreasonable conduct prolonged proceedings other than in relation to that period. His conduct did not cause additional hearings to be required.
72. Notwithstanding the claimant's means, the Tribunal has decided to exercise its discretion to award costs in this case.

The respondent's costs

73. The respondent's costs schedule shows the following in the relevant period (September 2023-22 February 2024):
- a. Emails: 18/1/24-19/2/24: £403
 - b. No telephone calls
 - c. Drafting: 8/2/24-13/2/24: £591
 - d. Correspondence: 17/1/24-15/2/24: £320.
74. Having exercised its discretion to award costs, the Tribunal, in determining the amount to be paid, has considered the claimant's means but has decided to award the full costs of the identified period as set out above, as it considers that these were incurred because of the conduct of the claimant. In any event, the Tribunal is satisfied that the claimant would be able to find some work relatively easily.
75. In the circumstances and taking into account all of the factors set out above, the Tribunal considers that an award of £1314 is an amount that the respondent likely to be able to recover from the claimant in his financial circumstances.

Employment Judge Rice-Birchall
Date: 7 February 2025

Sent to the parties on
Date: 19 February 2025

Notes

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<https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>