EMPLOYMENT TRIBUNALS

Claimant: James Humphrey

Respondent: Ecoserv FM Group Ltd

Heard at: Decided without a hearing

Before: Employment Judge Sanger

JUDGMENT

The Respondent conducted its defence to the claim unreasonably within the meaning of rule 74 (2)(a) of the Employment Tribunal Procedure Rules 2024 and it must pay costs to the Claimant in the sum of £3,028.90.

REASONS

1. The Claimant has submitted, in his application for costs, that his claim for costs starts on 5th December 2023, that being the date on which the Respondent failed to respond to correspondence which indicated that it had acted unlawfully.

2. The ET1 claim form was filed on 3rd April 2024.

3. An ET3 response and grounds of resistance were filed by the Respondent on 28th May 2024.

4. On 29th July 2024 a case management order was made directing, amongst other things, that disclosure take place by 12th August 2024.

5. A final hearing, which had been listed on 10th September 2024, was postponed at the request of the Claimant on 30th August 2024. This was unopposed by the Respondent, who provided available dates for the relisted hearing.

6. On 18th September 2024, the Respondent's representative noted in correspondence that the Claimant's documents had been received "weeks after the 12th August deadline".

7. An order of the Tribunal made on 18th October 2024 required the parties to exchange witness evidence by 21st January 2025.

8. On 21st January 2025 the Respondent's representative wrote to the Tribunal to say that the Respondent was insolvent, that she was no longer instructed and that all further correspondence should be sent to directly the Respondent.

9. No further correspondence was received from the Respondent after that date, either by the Tribunal or the Claimant.

10. The Claimant wrote to the Respondent with its witness statements on 12th February 2025.

11. The claim was heard on 21st February 2025. The Respondent did not attend and was not represented. No documents or witness statements had been filed on its behalf. Judgment was entered on behalf of the Claimant.

12. A costs application, accompanied by a schedule, was provided to the Tribunal on 27 February 2025.

13. On 24th March the Tribunal wrote to the parties, inviting the Respondent to respond to the costs application in seven days. No response has been received.

The Law

14. The application was for costs to be awarded under Rule 74(2) (*unreasonable behaviour or no reasonable prospects of success*) or Rule 74(3) (*failure to comply with an order*).

15. The Tribunal has a discretion to award costs under either rule.

16. Rule 74(2) states that a Tribunal must consider making a costs order where it considers that any of the following apply:

    a. A party, or their representative, has acted vexatiously, abusively, disruptively, or otherwise unreasonably in the bringing or conducting of the proceedings, or a part of them

    b. Any claim, response or reply has no reasonable prospect of success.

17. Rule 74(3) states that a Tribunal may make a costs order, on the application of a party, where a party has been in breach of any order, rule or practice direction.

18. Costs orders in the Employment Tribunal are the exception rather than the rule (Gee v Shell [2003] IRLR 82, Lodwick v Southwark [2004] ICR 844 and Yerrakalva-v-Barnsley Metropolitan Borough Council 2012 ICR 420, CA). The Tribunal's power to award costs should be sparingly exercised.

19. There is a two-stage exercise to making a costs order. The first question is whether a paying party has acted unreasonably or has in some other way invoked the jurisdiction to make a costs order. The second question is whether

the discretion should be exercised to make an order (Oni v Unison ICR D17). It does not follow that, because the Tribunal can make a costs order, it should.

Conclusions and discussion

20. I do not make a finding, under Rule 74(2)(b), that the response had no reasonable prospect of success. The grounds of resistance focused on a factual dispute. Because no evidence was provided to the Tribunal to rebut that which was relied upon by the Claimant, the Claimant's case succeeded, but this was not a case in which there was no reasonable prospect of success.

21. This test was summarised in Millin v Capsticks Solicitors [2014] UKEAT/0093/14:

"*Where a claim is truly misconceived and should have been appreciated in advance to be so, we see no special reason why the considerable expense to which a Respondent will needlessly have been put (or a claimant in a case within which a response is misconceived) should not be reimbursed in part or in whole*" (paragraph 67).

And in QDOS Consulting Ltd and others-v-Swanson UKEAT/0495/11, in which HHJ Serota QC indicated that the test of whether a claim had had no reasonable prospect of success was only met

"*in the most obvious and plain cases in which there [was] no factual dispute and which the applicant [could have] clearly crossed the high threshold of showing that there [were] no reasonable prospects of success*."

This is not a case that falls into that category.

22. I do, however, consider, under Rule 74(2)(a), that the Respondent acted unreasonably in its conduct of proceedings, in that it failed to engage with the Claimant, failed to file evidence and failed to attend the final hearing. The Claimant therefore incurred costs in relation to, for example, the preparation of the evidence, unanswered correspondence and taking sole responsibility for the preparation of the bundle.

23. I also find, pursuant to Rule 74(3), that the Respondent breached multiple orders, in that:

    a. it failed to comply with case management orders issued on 29th July 2024, which required it to exchange documents with the Claimant by 12th August 2024, agree a bundle by 19th August 2024 and produce an electronic file by 26th August 2024, prepare and exchange full written witness statements by 2nd September, send electronic copies of the file and the witness statements to the Tribunal and (if represented) file a list of issues by 27th September; and

    b. it failed to comply with case management orders issued on 18th October 2024, which required it to provide full written statements one month

before the hearing and (if represented) file a list of issues one week before the hearing.

24. Having determined that the Respondent acted unreasonably and breached orders of the Tribunal, I must consider whether I should exercise my discretion to make an order in favour of the Claimant.

25. In doing so I note that the Claimant also breached a number of orders, those being:

    a. he failed to comply with case management orders issued on 29th July 2024, which required him to send the Respondent copies of relevant documents by 12th August 2024, agree a bundle by 19th August 2024, prepare and exchange full written witness statements by 2nd September, send electronic copies of the file and the witness statements to the Tribunal and file a list of issues by 27th September; and

    b. he failed to comply with case management orders issued on 18th October 2024, which required him to provide full written statements one month before the hearing and file a list of issues one week before the hearing.

26. I note that the first hearing was listed on 10th September and was postponed, upon the application of the Claimant, who had booked a holiday abroad after providing his availability and before receiving the listing date. He had not updated the Tribunal of his revised availability.

27. At that stage, it does not appear that the matter was ready to proceed. The Claimant would appear to have served its evidence on the Claimant, albeit late, but had not prepared its witness statements, which were due by 2nd September 2024.

28. The Respondent, according to an email of 18th September 2024, appears to accept that it had not complied with directions but asserted that the Claimant had also failed to do so, in that it served evidence “several weeks after the 12th August deadline”. The precise date is not known to the Tribunal.

29. Upon postponement of the case, revised case management directions were issued. Parties were directed to agree a bundle by 27th December, the Claimant was directed to send the same to the Respondent by 10th January and the parties were directed to exchange witness evidence by 21st January 2025.

30. On 17th December 2024, the Claimant’s representatives wrote to the Tribunal to request an increase to the size of the bundle. In that correspondence they referred to “discussions with the other parties”, which indicates that the Respondent was complying with the direction to agree a bundle eight weeks prior to the hearing.

31. On 21st January it was noted by those who had been acting for the Respondent, that the Respondent was insolvent and they were no longer instructed. There

was no further contact from the Respondent thereafter and it did not file witness statements or attend the hearing.

32. The Claimant served its witness statements on 12th February 2025.

33. The matter was heard on 21st February 2025.

34. In terms of causation, it is unnecessary to show a direct causal connection between the behaviour and the loss (McPherson-v-BNP Paribas [2004] ICR 1398 and Raggett-v-John Lewis [2012] IRLR 911, paragraph 43), but there does have to have been some correlation between the unreasonable conduct alleged and the loss (Yerraklava-v-Barnsley MBC [2010] UKEAT/231/10). I was required to have regard to the "whole picture of what happened in the case" (per Kerr J, paragraph 22, Sunuva-v-Martin UKEAT/0174/17).

35. I did not have the whole picture and could only make a decision based upon the information provided to me by the Claimant in his application.

36. There was clearly a correlation between the lack of engagement and the further work incurred in preparing the matter for Tribunal but I do not find that this was so gross as to warrant awarding the full amount claimed. The Respondent did file a response and, until (at least) 17th December 2024 was engaging in the preparation of the bundle and, it can be inferred, was intending to participate in the hearing.

37. Given the history of the matter, I consider it appropriate and proportionate to award a portion of costs sought which, on balance, is assessed at 50% of that claimed.

38. The total amount claimed on the schedule was £9,426.96 + VAT. However, this appears to be an error. The total sum set out for work on documents was £4,371.36 + VAT and the total sum set out for attending a hearing was £676.80 + VAT. The two figures add up to £5,048.16. The Tribunal has therefore taken the view that £9,426.96 was entered in error into the subtotal box.

39. The amount to be awarded is therefore £2,524.08 + VAT, being £3,028.90.

Employment Judge Sanger
Date: 12 June 2025

Judgment sent to the parties on
25 June 2025

Jade Lobb
For the Tribunal