



EMPLOYMENT TRIBUNALS

Claimant: Mr P Fitzgerald

Respondent: Bristol Waste Company Limited

Heard at: Bristol **On:** 21 October 2024

Before: Employment Judge Livesey

Representation:

Claimant: Did not attend

Respondent: Ms Johns, counsel

JUDGMENT

The Respondent's application under rule 76 (1)(a) succeeds and the Claimant is to pay the sum of £12,807.60 in respect of its costs.

REASONS

1. This hearing was convened to determine the Respondent's application for costs. Pages cited within these Reasons relate to pages within the hearing bundle unless otherwise stated and have been quoted in square brackets. Pages in the supplemental bundle had been cited as follows; '[SB;...]'.

Background

2. This claim has a long and difficult history.
3. By a Claim dated 3 February 2023, the Claimant brought complaints of unfair dismissal (ss. 98 and 103A), detriment on the grounds of public interest disclosure, breach of contract and/or unlawful deductions from wages.
4. After a response was filed, the matter came before Employment Judge Goraj on 12 July 2023 for initial case management. The issues were identified, directions were given and the case was listed for a five-day hearing in March 2024.
5. A further case management 'catch up' hearing took place before Employment Judge Volkmer on 23 January 2024. She recorded the fact

that neither party had been able to comply with the directions. The problems were attributed to an illness which the Claimant had suffered and the volume of the Respondent's disclosure. She therefore decided to postpone the March hearing and to relist it for seven days with fresh directions. The issues were revisited and amended where appropriate.

6. Problems with compliance with the case management directions continued.
7. Employment Judge Gray undertook some further case management on 16 July, after a Dispute Resolution Appointment, which the Claimant did not attend. Extensions of time were given in respect of the bundle and witness statements. In his email of 5 August, he apologised for his non-attendance and stated that he must have *"omitted this to my business and personal diary....The hearing on 23 January 2020 nearly 6 months before this hearing so you can appreciate this might have slipped my mind. [sic]"*
8. The Respondent applied for an 'unless order' on 3 September because of the Claimant's continued failure to comply with case management directions, specifically, the requirements to provide a specific piece of further information, his duty of disclosure and cooperation over the compilation of the hearing bundle. It then made a costs application on 12 September. In reply on 16 September, the Claimant intimated a complaint to the SRA in respect of the Respondent's representatives' alleged conduct, which was followed with evidence of their alleged 'misbehaviour' on 21 and 22 September.
9. A fourth Case Management Preliminary Hearing took place before Employment Judge Self on 27 September. It was clear that the Respondent was very keen to maintain the hearing date, but the Claimant was doubtful that it was viable. The Judge kept the matter in the list and set a tight timetable for final compliance. The directions which he made were explicitly recorded to have been set by agreement (paragraph 4) but he made it clear that, if they were breached, consideration would then have been given to the striking out of the claim or response, depending upon where the blame fell (paragraph 3).
10. At that point, there were four outstanding issues;
 - a. A request for further information from the Claimant in relation to paragraph 3.1.1.3 of the List of Issues;

That was to have been provided by 3 October and, indeed, the Claimant did comply;
 - b. Additional documentation for the hearing bundle which the Claimant had wanted included;

He was directed to have supplied it to the Respondent by 3 October and it was then to have created a bundle for it by the 10th. Although the Claimant did not supply the documentation on time, he did send documents on 6 and 7 October and a supplementary bundle was prepared for the final hearing;
 - c. A specific disclosure application from the Claimant; any application

for specific disclosure was to have been made by 3 October, with the Respondent required to respond by 10 October;

The Claimant made two applications on 29 and 30 September, the first for eight classes of documents and the second for four classes of documents. The Respondent responded on 10 October as required;

- d. Witness statements were to have been exchanged on 9 October;

It was noted by Employment Judge Self that the Claimant had said that his statement was '75% ready' on 27 September.

The Respondent attempted to agree a suitable time for exchange and the Claimant gave a clear indication that he was prepared to do so at 3.00 pm on 9 October, the Wednesday before the final hearing. The Respondent duly supplied its witness statements then, but the Claimant did not.

At 10:37 pm on Thursday night (10 October), the Claimant wrote to say that he had been at a family funeral in Jersey which had prevented him from complying with the direction. He promised his statement "*over this weekend*". Given that it appeared that the funeral had taken place *by* Wednesday, he was left with that day, Thursday and Friday to have provided his statement.

I saw that correspondence on Friday and made an unless order in the following terms that day at 11.26 am;

"Unless by 5.00 pm today (11 October) the Claimant sends his witness statement to the Respondent, he will be debarred from relying upon it at the hearing, save with the leave of the Tribunal if exceptional circumstances for the delay can be demonstrated."

The following reasons were given;

- *"The directions made by Employment Judge Self were explicitly ones made by consent;*
- *At that point, the statement was said to have been '75%' complete;*
- *The Respondent's statements were disclosed on 9 October following a clear indication from the Claimant that he was to have sent his at 3.00 pm too. He did not do so;*
- *His asserted need to travel to Jersey has been wholly unsupported by documentation (e.g. travel documentation or otherwise);*
- *Seven days of Tribunal time is at risk of being lost as a result of this breach;*
- *This is already the second listing of the claim."*

Just after 9.30 pm on Sunday 13 October, and about 12 hours before the hearing was due to start, the Claimant sent his witness statement to the Tribunal and the Respondent's representatives. It was accompanied by an email in which he said that he had been advised by his GP to stay away from his emails in the run-up to the

final hearing (no medical evidence was supplied in support of that assertion). His trip to Jersey was wholly un-evidenced, he said, because he had flown to the island on a private jet. He was not even prepared to identify the person whose funeral it had been;

"I would love to provide the persons name, website address for his businesses throughout the world etc but I am under family discretion not to provide which I hope you can understand."

The witness statement exceeded the agreed limit by nearly 50% and there were comments within it, and within the accompanying emails, upon the Respondent's witness statements.

11. Despite the emails on Sunday night, the Claimant did not attend the hearing. The Tribunal's clerk telephoned him without success (there was no reply). A public tannoy was put out for him in the Bristol Civil Justice Centre, also without success and, at 10:45 am, the Tribunal acceded to the Respondent's application to have the claim dismissed under rule 47. The case had clearly been listed to start at 10.00 am (see paragraph 5 of Judge Volkmer's Order of 23 January 2024) and Employment Judge Gray's Order of 16 July also made it clear that Elaine Holt's evidence was to have been dealt with on the first day because of her availability (paragraph 4).
12. It is right to say that the Claimant's email of 10 October had included a fit note covering his absence from work between 10 and 17 October on the grounds of 'stress', but no further medical was attached and there was nothing to indicate an inability to attend the hearing, nor did he apply for a postponement either then, before or after that email. Indeed, he continued to act as if the hearing was proceeding. He did not, for example, query or challenge the earlier part of my email of 11 October in which I had said that the specific disclosure issue would have to have been dealt with *"at the start of the hearing on Monday"*.
13. Despite having commented upon the Respondent's costs application (see below), the Claimant did not attend the hearing today nor seek to explain his non-attendance. Given the history, that was not a surprise.

Respondent's arguments

14. The Respondent had made a previous application for costs, but had been directed to summarise all its arguments in one, comprehensive application in advance of the hearing which would have enabled the Claimant to have been able to understand and respond to it. That application was provided on Wednesday 16 October in compliance with the direction. The Claimant replied to it the following day.
15. The broad basis of the claim was that the Claimant's conduct had been unreasonable, vexatious, abusive, disruptive or otherwise unreasonable within the meaning of rule 76 (1)(a). There were two particularised grounds which were broke down into several sub-grounds. They were, in summary, as follows;
 - a. He had unreasonably failed to attend the Dispute Resolution Appointment ('DRA') on 16 July 2024;

The Respondent argued that the Claimant had been well aware of the date set for the DRA; he had been at the hearing on 23 January when the date had been set, he had been sent a copy of Judge Volkmer's Order [118] and, in the run-up to the hearing, the Respondent had written to him on three occasions about it before the Tribunal itself provided the access codes the day before [SB; 164-5].

In his email to the Tribunal of 5 August, his explanation that he omitted the date from his business and personal diary and that it had 'slipped his mind', was not accepted by the Respondent. In his further email of 11 September, he stated that he had tried to call the Tribunal 'several times' on the afternoon of 15 July and the morning of 16 July with 'zero response' [SB; 121]. Not surprisingly, the Respondent argued, it was put to unnecessary cost and expense of attending the DRA alone which became a fruitless exercise;

- b. His conduct in proceedings generally had been unreasonable, vexatious, abusive, disruptive or unreasonable. That argument broke down into a number of sub-grounds which could be summarised as follows;
- The Claimant repeatedly made unfounded, serious allegations about the Respondent and/or its representatives without evidential support; accusations of 'wilful' malpractice, 'lies' and 'improper conduct' were peppered throughout his correspondence;
 - He threatened the withdrawal of work from the Respondent from new employer [SB; 177-183];
 - He repeatedly breached Tribunal directions; six specific examples were given as follows;
 - (i) The order to provide further information (paragraph 23 of the Order of 23 January 2024 [120]);
 - (ii) The direction to make disclosure by 5 August (paragraphs 7 and 29 [148 & 152]);
 - (iii) The requirement to attend the Preliminary Hearing on 27 September; he attempted to avoid attendance due to work commitments [SB; 137-8], but did ultimately attend;
 - (iv) The requirement to exchange witness statements (see paragraph 10 (d) above);
 - (v) The requirement to disclose additional documents (see paragraph 10 (b) above);
 - (vi) Failed to attend the final hearing (see paragraphs 11 and 12 above).

Claimant's position

16. The Claimant did not respond to the costs application, save by way of an email dated 17 October, dealt with in more detail below. He sought to challenge several items within the costs schedule, but not the basis or reasons for the application as set out in the Respondent's lengthy letter.

Relevant principles

17. Rule 76 (1) imposed a two-stage test: first, a tribunal had to ask itself whether a party's conduct fell within rule 76(1)(a); if so, it *had to* go on to ask itself whether it was appropriate to exercise its discretion in favour of awarding costs against that party. When the threshold requirements for an order for costs were met under rule 76 (1)(a) of the 2013 rules, it by no followed that, because it *may* have made a costs order, it would proceed to do so. It had a discretion;
"The discretion is very broad and it would require a clear error of principle to justify an appeal, whether for or against an order for costs." (FDA and others-v-Bhardwaj [2022] EAT 97).
18. As the Court of Appeal reiterated in *Yerrakalva-v-Barnsley Metropolitan Borough Council* 2012 ICR 420, CA, costs in the employment tribunal were still the exception rather than the rule. It commented that the tribunal's power to order costs was more sparingly exercised and was more circumscribed than that of the ordinary courts, where the general rule was that costs followed the event and the unsuccessful litigant normally had to foot the legal bill for the litigation.
19. Under rule 76 (1)(a) the question which fell to be addressed was whether the Claimant had *"acted vexatiously, abusively, obstructively or otherwise unreasonably in...the way that the proceedings (or part) [had] been conducted."*
20. In terms of causation, it was unnecessary to show a direct causal connection between a particular item of cost incurred and a specific act or omission (*McPherson-v-BNP Paribas* [2004] ICR 1398 and *Raggett-v-John Lewis* [2012] IRLR 911, paragraph 43), but there nevertheless had to have been some broad correlation between the unreasonable conduct alleged and the loss (*Yerraklava-v-Barnsley MBC* [2010] UKEAT/231/10). Regard had to be taken of the *'nature, gravity and effect'* of the conduct alleged in the round (both *McPherson* and *Yerraklava* above). Regard had to be taken of the *"whole picture of what happened in the case"* (per Kerr J, paragraph 22, *Sunuva-v-Martin* UKEAT/0174/17).
21. A costs order was restorative, not punitive (*Lodwick-v-Southwark London BC* [2004] EWCA Civ 306) and I could not make one simply because the Claimant had got something wrong.
22. Under rule 84, a tribunal *may* have taken into account the Claimant's means when considering both whether to make a costs award and, if so, in what amount.
23. The Claimant's status as a litigant in person also had to be considered; *AQ Ltd-v-Holden* [2012] IRLR 648 (EAT):
"A tribunal cannot and should not judge a litigant in person by the standards of a professional representative. Lay people are entitled to represent themselves in tribunals; and, since legal aid is not available and they will not usually recover costs if they are successful, it is inevitable that many lay people will represent themselves. Justice requires that tribunals do not apply professional standards to lay people, who may be involved in legal proceedings"

for the only time in their life. As [counsel for the claimant] submitted, lay people are likely to lack the objectivity and knowledge of law and practice brought by a professional adviser...”

Discussion and conclusions

24. Taking the first of the Respondent's arguments, in light of the information which the Claimant had undoubtedly received in relation to the DRA on 16 July 2024, his non-attendance constituted unreasonable conduct. On the balance of the evidence, it could not be accepted that he had simply failed to diarise the event, particularly in light of his attendance at the previous hearing, the importance that he ought to have attached to the Order which was subsequently sent and the dial in details which he received the day before.
25. His explanation, that he had failed to diarise it, was extraordinary in the circumstances. His further email of 11 September, in which he stated that he had tried to call the Tribunal 'several times' on the afternoon of 15 July and the morning of 16 July with 'zero response' [SB; 121] begged the question why he had been calling if he had not known about the hearing. The main purpose of that hearing had been thwarted.
26. As to the Respondent's second category of arguments, there was little doubt that the Claimant had resorted to accusatorial invective all too readily in correspondence. Solicitors in a position of those representing the Respondent had to have broad shoulders when dealing with litigants in person, but the repetitive, belligerent nature of the Claimant's correspondence was out of the ordinary.
27. His threatened withdrawal of work [SB; 177-183] was clearly linked to the litigation and was a threat associated with it. The letter was sent to the Respondent's legal representative and the Tribunal, albeit that it was not clear precisely what he wanted the Respondent to do to avoid the threat, but it was clearly something which he considered "*could have easily been avoided*".
28. Amongst the six case management breaches which were highlighted by the Respondent, the two which were of particular concern were (iv) (his failure to exchange witness statements) and (vi) (his non-attendance at the hearing).
29. In relation to (iv), it appeared to have been yet another example of the Claimant choosing to do what he wanted, when he wanted, despite the existence of case management directions which he had agreed to and the inconvenience and prejudice that his actions caused the Respondent.
30. On 24 September, he had indicated that he was to have attended a funeral in Jersey [SB; 137]. That was *before* he had signed up to the agreed directions before Employment Judge Self on 27 September. He had stated then that he was to have been away between 9 and 11 October. In his email of 10 October, however, he indicated that it was the funeral of "*an immediate family*" member which had been "*arranged at short notice*". The fact that he was then speaking about it in the past tense suggested that the original dates had not been accurate. When the 'unless

order' was issued on 11 October, in part, because his "*asserted need to travel to Jersey has been wholly unsupported by documentation (e.g. travel documentation or otherwise)*", his response was surprising to say the least; he suggested that there was no evidence at all of the trip and that family discretion prevented him from even naming the deceased.

31. His further email to the Tribunal of 15 October then suggested a different chronology from that specified on 24 September; he said that he had flown on the 8th and returned on the 10th (although he said that it was 'July', not 'October', which was assumed to have been a mistake).
32. In relation to (vi), the matters covered in paragraphs 11 and 12 above did not need to be repeated. His conduct reflected the events of 16 July and what happened today.
33. Today's hearing was another chance for the Claimant to have had his say in person. It had been listed in that manner for that reason. Had it been known that he would not have engaged, the costs application could have been dealt with on paper, saving the Respondent further expense.
34. There could have been little doubt that the Claimant's behaviour and the manner in which he had conducted proceedings had been unreasonable in several respects and the threshold test within rule 76 was passed for the reasons set out above. Having read the Tribunal file and the hearing bundle, the Claimant had demonstrated that he was an intelligent and astute man, but one who seemed to believe that the proceedings had to run to his agenda, despite the cost and inconvenience that that caused to the Respondent and/or the Tribunal.
35. The Claimant's status as a litigant in person did not, in my judgment, acquit him of the clear and repetitive breaches of case management orders which he was guilty of in this case. It was a feature of litigation before the Employment Tribunal that many parties, particularly Claimants, represent themselves. Most do so competently, diligently and respectfully. The orders which Tribunals make are clear and compendious and do not habitually cause the problems which had been experienced in this case.
36. The Respondent had prepared for a final hearing over seven days, but had only received the Claimant's witness evidence on the morning of the first day, a hearing which the Claimant then failed to attend. The amount of correspondence on the Tribunal file and the fact that the case had had four case management hearings demonstrated the difficulties which the Respondent had faced in its preparation.
37. Accordingly, not only was the threshold test in rule 76 met, but it was appropriate in the circumstances to exercise my discretion in the Respondent's favour and award costs.
38. As to the amount of costs, the Schedule attached to the Letter of Application revealed a total sum incurred of £38,422.80, but the Respondent chose to reduce the sum sought to £20,000 in order to avoid the time and further expense of a detailed assessment under rule 78.
39. The Claimant sent an email on 17 October in which he requested certain

documentation from the Respondent in support of its application and some of the sums claimed. He did not, however, seek to challenge the underlying rationale for the application and said that he was “*open to discuss fees*” and expressed thanks for the claim having been reduced.

40. The issue which I explored with Ms Johns during the hearing was the attributability of the costs claimed to the unreasonableness of the Claimant’s conduct. Whilst a forensic line of causation did not have to have been found for every sum, a significant element of the costs incurred would have been spent in any event had the Respondent fought the claim through to a final hearing and the Claimant had not behaved unreasonably. She accepted that.
41. Nevertheless, there would not have been the need for four preliminary hearings, the DRA would not have been wasted and the costs of this hearing would not have been incurred. There was significant additional correspondence necessary to chase outstanding compliance and to apply to the Tribunal.
42. Ms Johns considered that at least 50% of the total costs incurred had been caused by the conduct that was caught by rule 76 (1)(a). I considered that that was generous. Doing the best that I could, but erring slightly on the side of caution, I considered the figure to have been more appropriately set at 33%. Litigation of this sort is expensive and there would still have been an initial case management preliminary hearing and a DRA, given that it was listed for 7 day final hearing. A total figure therefore of £12,807.60.
43. The Claimant put no evidence of his means before the Tribunal. There was no good reason not to order the sum set out above in full.

Employment Judge Livesey

Date 21 October 2024