EMPLOYMENT TRIBUNALS

Claimant: Paul Bocij

Respondent: QAHE Ltd

JUDGMENT

The respondent is ordered to pay the claimant's costs summarily assessed in the sum of £1000 pursuant to rule 76 (1) and (2) of the Employment Tribunal Rules 2013.

REASONS

Introduction and the issues

1. I conducted an open preliminary hearing on 26 May 2023 which was listed to determine the issue of whether the claimant was disabled at material times. The hearing had been listed by EJ McCluggage at a preliminary hearing for case management held on 13 March 2023.

2. The hearing had to be postponed because the claimant had not provided a supplemental impact statement about the effects of his disability as he had been ordered to by EJ McCluggage. The hearing was ineffective due to the claimant's conduct in not complying with EJ McCluggage's order.

3. The respondent applied for an order that the claimant pay the costs they had incurred in attending the hearing, limited to counsel's brief fee for the hearing.

4. The costs application was made under Rule 76 of the Tribunal's rules of procedure. Under Rule 76(1) it was said that the claimant's conduct of the proceedings in terms of not providing the impact statement was unreasonable. Under Rule 76(2) it was said that the claimant had been in breach of EJ McCluggage's order and as a result the hearing had been postponed on the respondent's application.

5. It was not disputed that the claimant had been in breach of EJ McCluggage's order and as a result the hearing had been postponed on the respondent's application.

6. The issues I had to determine were whether the claimant's conduct of the proceedings had been unreasonable and whether to award the respondent costs and if so in what amount.

The law

7. The tribunal's power to award costs is set out in rules 74 to 84 of the 2013 Employment Tribunal Rules. I set out the relevant parts of the rules below:

Rule 76 - When a costs order or a preparation time order may or shall be made

(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that –

(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or others unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or

(b) any claim or response 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 the relevant hearing begins.

(2) A Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been adjourned or postponed on the application of a party.

Rule 77 – Procedure

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. No such order may be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application.

Rule 78 - The amount of a costs order

(1) A costs order may –

(a) order the paying party to pay the receiving a specified amount, not exceeding £20,000, in respect of the costs of the receiving party;

Rule 84 - Ability to pay

In deciding whether to make a costs, preparation time, or wasted costs order, and if so in what amount, the Tribunal may have regard to the paying party's (or, where a wasted costs order is made, the representative's) ability to pay.

8. In Milan v Capsticks Solicitors LLP & Others UKEAT/0093/14/RN the then President of the EAT, Langstaff J, explained that a structured approach should be taken in relation to an application for costs. He described the exercise to be undertaken by the Tribunal as a 3-stage exercise at paragraph 52:

"There are thus three stages to the process of determining upon a costs order in a particular amount. First, the tribunal must be of the opinion that the paying party has behaved in a manner referred to in [Rule 76]; but if of that opinion, does not have to make a costs order. It has still to decide whether, as a second stage, it is "appropriate" to do so. In reaching that decision it may take account of the ability of the paying party to pay. Having decided that there should be a costs order in some amount, the third stage is to determine what that amount should be. Here, covered by Rule [78], the tribunal has the option of ordering the paying party to pay an amount to be determined by way of detailed assessment in a county court."

9. As the Court of Appeal reiterated in Yerrakalva v Barnsley Metropolitan Borough Council and anor 2012 ICR 420 costs in the employment tribunal are the exception rather than the rule.

10. Given that costs are compensatory, and not punitive (Lodwick v Southwark London Borough Council 2004 ICR 884, CA) it is necessary to examine what loss has been caused to the receiving party. In this regard the Court of Appeal in Yerrakalva held that costs should be limited to those 'reasonably and necessarily incurred' and also made clear that whilst there is no requirement for the Tribunal to determine whether there is a precise causal link between the unreasonable conduct in question and the specific costs being claimed, that does not mean that causation is irrelevant.

11. In determining whether to make an order under the ground of unreasonable conduct, a Tribunal should take into account the "nature, gravity and effect" of a party's unreasonable conduct (McPherson v BNP Paribas [2004] ICR 1398). The vital point in exercising the discretion to order costs is to look at the whole picture. 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 (Yerrakalva).

12. As set out above Rule 84 provides that in deciding whether to make a costs order or in what amount the tribunal may have regard to the paying party's ability to pay. Rule 84 allows the tribunal to have regard to the paying party's ability to pay, but it does not have to (Jilley v Birmingham and Solihull Mental Health NHS Trust and ors EAT 0584/06). The tribunal does not have to limit a costs order to what the paying party can afford to pay, or is able to pay at the time the order falls to be made (Arrowsmith v Nottingham Trent University [2011] EWCA Civ 797).

13. The threshold to trigger costs is the same whether a litigant is or is not professionally represented, although in applying those tests the EAT has held that the status of a litigant is a matter which the tribunal should take into account. The fact that a party is not represented may be relevant to whether the direction to award costs should be exercised. But lay people are not immune from orders for costs: some litigants in person act unreasonably even when proper allowance is made for their inexperience and lack of objectivity and they are consequently ordered to pay costs. See AQ Ltd v Holden 2012 IRLR 648 and the approval of

the reasoning in Holden by Underhill P in Vaughan v London Borough of Lewisham and ors 2013 IRLR 713.

14. It is well-established that an employment tribunal should not include VAT in a costs award if the receiving party is registered for VAT and, therefore, able to recover the VAT element as input tax (Raggett v John Lewis plc 2013 ICR D1). I assumed, given the size of the respondent and the fact it is a limited company, that the respondent is registered for VAT.

Relevant background facts

15. By the time of the preliminary hearing before EJ McCluggage the claimant had already been ordered to provide an impact statement and medical records. These were ordered to be provided by 17 February 2023. The claimant submitted a statement and some medical records. The respondent set out its position on these in an email of 3 March 2023. In summary the respondent pointed out that the claimant's impact statement failed to address the relevant questions, in particular it failed to detail the effect of the alleged disability on the claimant at the relevant time. Therefore they were unable to accept that the claimant was disabled. EJ McCluggage evidently agreed with the respondent and decided the impact statement provided was insufficient. He ordered the claimant to provide a supplemental impact statement by 26 April 2023 and he identified the specific information that should include, in particular the detail as to the effect of the alleged disability on the claimant at the relevant time. EJ McCluggage also ordered the claimant to provide any further medical records by the same date.

16. EJ McCluggage stipulated the following in his order:

"29. These orders were made and explained to the parties at this preliminary hearing. They must be complied with even if this written record of the hearing arrives after the date given in an order to do something.

30. If any of these orders is not complied with, the Tribunal may: (a) waive or vary the requirement; (b) strike out the claim or the response; (c) bar or restrict participation in the proceedings; and/or (d) award costs in accordance with the Employment Tribunal Rules.

31. Anyone affected by any of these orders may apply for it to be varied, suspended, or set aside."

17. The claimant attended the hearing before EJ McCluggage. The claimant says he is unable to take notes, and so he was given permission to record the hearing before EJ McCluggage.

18. Following the hearing before EJ McCluggage on 13 March there was a delay in his order being sent to the parties. His order was emailed to the parties on 10 May 2023. I do not know the reasons for that delay.

19. The claimant did not properly comply with the orders made by EJ McCluggage. In particular the claimant did not provide a supplemental impact statement. The claimant provided some further medical records, albeit these were late. The further medical records were a report from a GP and some information about a PIP which were sent to the Tribunal on 24 May 2023.

20. I postponed the hearing following an application by the respondent because of the claimant's failure to provide a supplemental impact statement, i.e. a statement properly addressing the questions the tribunal would need to consider. I decided that in the absence of the claimant's supplemental statement there could not be a fair hearing but in the circumstances it would not be proportionate to strike out the disability discrimination claim. The respondent's postponement application was accompanied with their application for costs. The claimant was given a reasonable opportunity to respond to the applications at the hearing.

Analysis and conclusion

21. I considered the following matters:

    a. Has the claimant behaved in a manner proscribed by the rules?
    b. If so, should I exercise discretion to make a costs order in the respondent's favour?
    c. If I exercise discretion in favour of a costs order, what amount should be paid?

22. It was not disputed that the claimant had failed to comply with the order made by EJ McCluggage to provide a supplemental impact statement. It was also not disputed that the hearing had been postponed on the respondent's application and that the reason for the postponement had been the claimant's failure to provide a supplemental impact statement.

23. The respondent submitted that the claimant had conducted the proceedings unreasonably in failing to provide a supplemental impact statement and that as a result they had incurred costs of counsel's fee for attending the hearing which had been postponed because of the claimant's unreasonable behavior. They invited me to award costs against the claimant in the sum of counsel's brief fee. It was said this cost had been caused unnecessarily as a result of the claimant's unreasonable conduct (Rule 76 (1)) and/or his failure to comply with an order (Rule 76 (2)).

24. The claimant responded to the respondent's costs application at the hearing. He focused on his reasons for not complying with EJ McCluggage's order. I was not satisfied that there was any reasonable explanation for the failure to comply with the order and I considered that the claimant's conduct in not providing a supplemental statement prior to the hearing was unreasonable. I agreed with the respondent's submissions summarised above. I took into account the main point relied upon by the claimant which was that there had been a delay in receiving the order made by EJ McCluggage as his order had only been received by the parties on 10 May 2023. However, the claimant had been present at the

hearing on 10 March when the order had been made and explained to him. The claimant had also recorded the hearing on 10 March. It was the second time he had been ordered to provide an impact statement and he had the first order in writing. There was ample time for the claimant to comply (albeit late) with the order once he received it on 10 May 2023. EJ McCluggage had clearly stipulated that his orders must be complied with even if the written record of the hearing arrived after the date given in an order to do something. It seemed to me that the claimant had simply ignored that and ignored the fact that he needed to do a statement as he knew the hearing was still going ahead. This was all unreasonable conduct.

25. I decided to exercise the discretion to award costs against the claimant. The claimant had not presented any cogent basis for why costs should not be awarded. The claimant had completely failed to comply with the order to provide a supplemental impact statement and ignored the part of the order which stipulated he should still comply even if the order was received late. It was the second time an order had been made for the claimant to provide an impact statement. The claimant had not informed the respondent or the tribunal that he was having any specific difficulties with producing the statement for the hearing. The claimant had been warned about the consequences if he failed to comply with EJ McCluggage's order, in particular that costs may be awarded against him. It seemed to me these were all factors strongly supporting exercising the discretion.

26. I took into account that the claimant is unrepresented but I did not consider that this was a factor which should go against the exercise of the discretion. The order for the claimant to provide a supplemental statement was clear, as was the fact that the claimant should comply with the order even if it was received late and the warning as to costs if the claimant did not comply. The importance of the statement to the hearing on 26 May was obvious. In my view all of these matters were understandable by a litigant in person and the claimant is in fact a highly qualified academic working in a senior position so they should have been easily understandable by him.

27. I next considered the amount of costs. As a direct result of the claimant's unreasonable conduct and failing to comply with an order the hearing had to be postponed and the respondent's costs in instructing specialist counsel to attend the hearing (which I was satisfied was a reasonable step) had effectively been wasted. This was the loss which was caused to the respondent as a result of the claimant unreasonable conduct/failure to comply with an order.

28. The respondent limited their costs application to counsel's brief fee which was £1250 plus vat so £1500 in total. I did not agree with the claimant that these costs were excessive. I considered they were proportionate and reasonably and necessarily incurred. I did not take into account the VAT element of the costs for the reason I have already mentioned. In view of the relatively limited amount of costs claimed and the fact the claimant is earning a substantial salary I decided not to take into account the claimant's means.

29. I took into account that there had been a significant delay in EJ McCluggage's order being sent to the parties. His order was not sent to the parties until 10 May 2023. I do not know the reasons for that, but it was obviously not ideal. I did not consider that this provided a reasonable excuse for the claimant not complying with EJ McCluggage's order at all or that it made his behavior any less unreasonable. However I did consider that this was a factor which could have made timely compliance more difficult for the claimant. I was aware from the case of Yerrakalva that the claimant's conduct should not be considered in isolation from the rest of the case and it seemed to me that the delay in providing the order was a factor to be taken into account which was not the claimant's fault, albeit it was not crucial. Consequently I decided that I should not award the total costs claimed by the respondent but should make a relatively modest reduction. I therefore ordered that the claimant shall pay the respondent costs in the total sum of £1000.

30. In light of the above I concluded that:

    a. the claimant had behaved in a manner proscribed by the rules as he had failed to comply with an order of the tribunal and had conducted part of the proceedings unreasonably in failing to provide a supplemental impact statement,
    b. I should exercise discretion to make a costs order in the respondent's favour and,
    c. the amount of costs the claimant should pay should be £1000.

Employment Judge Meichen
19 July 2023