



EMPLOYMENT TRIBUNALS

Claimant

Mr M Miah

v

Respondent

Axis Security Services Limited

Heard at: Birmingham

On: 12 September 2017

Before: Employment Judge Benson

Appearances

For Syed Solicitors: Mr Hussein (legal representative)

For the Respondent: Mr Antill (Director)

RESERVED JUDGMENT

1. The Claimant's representatives Syed Solicitors are order to pay to the Respondent the sum of £3600 by way of wasted costs.

REASONS

The Application

1. This is an application made by the Respondent for an order that the Claimant's solicitors Syed Solicitors (Syeds) pay their wasted costs following the striking out of the Claimant's claim on 27 April 2017 on the basis that the tribunal did not have jurisdiction to hear the claim, as it had not been presented in time in circumstances where it was practicable to do so. They seek the sum of £6835.26. The application is resisted by Syeds.

The issues and submissions

2. The Respondent has submitted written grounds of application dated 24 May 2017 supplemented by oral submissions from Mr Antill and the Claimant and Syeds have put forward a written response which made only scant reference to the application and which Mr Hussien did not refer to in his submissions, instead making full oral submissions. The Claimant was in attendance at the hearing but did not participate other than to provide a written chronology.
3. The Respondent contends that by posting the claim form on Thursday 26 January 2017 (the date upon which Syeds said it was posted at the last hearing), rather sending it by email or fax when the time for lodging a claim was due to expire on Sunday 29 January, Syeds committed a negligent act of

omission, in that a reasonably competent solicitor would have contacted the Tribunal office and/or used the Royal mail tracking system in order to ensure that the ET1 had been received. Had the representative had done so he would have found that the claim had not been received and used an alternative method to ensure it had been delivered. It further contends that the conduct of the Claimant's representative caused the Respondent to incur unnecessary costs, in that Syeds had adequate opportunity to assess the legal position, prepare requisite evidence if it existed and should have advised the Claimant to withdraw his claim rather than causing the Respondent to incur further unnecessary costs in having to continue to defend it. The Respondent wrote to the Claimant on 5 April 2017, warning them that if the Claimant proceeded with the claim and did not withdraw it at that stage, they would seek an order for costs.

4. The Claimant's representative during his submissions contended that there should be no order. Mr Hussien accepts that if an individual instructs solicitors that individual is entitled to rely upon that firm lodging the claim on time. He accepts that it was the Syeds' responsibility that the claim was not posted, he says, until 27 January 2017. Syeds had been instructed on a fee paying basis to lodge the claim. He contends however that there is no link between any negligence of his firm and the costs incurred by the Respondent, in fact he suggests that the Respondent has benefitted from the position in that the Respondent is not at risk that the claim may be successful and that they would have had to pay their solicitor's fees in any event.
5. He suggests that although on the face of it, the claim had been presented out of time, it was not bound to fail in that this was not so obviously clear such that a reasonable solicitor would have advised that the Claimant withdraw the proceedings and not have proceeded to the hearing on 27 April 2017. He relies upon three reasons for this suggestion:
6. Firstly that the overriding objective provides that there should be flexibility in proceedings and as such that a judge on the day may have allowed the claim to proceed even if it was out of time, as the margin of delay (one day) was so small. He considered that the Judge would have some discretion.
7. Secondly that if the matter had been so obvious, then the claim would not have been accepted by the Tribunal in the first place or allowed to proceed and the Respondent's application to strike it out at an earlier stage would have been successful.
8. Thirdly that the postal rule under common law would allow for the deadline to be moved to the Monday 30 January when the deadline fell on a non-working day. Mr Hussein referred to Rule 4(2) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ('Rules of Procedure') to support this contention, and suggested that it therefore could not be said that the firm was negligent if they could have presented this argument on the day.
9. Finally Mr Hussein referred to the principle that to award costs against his firm would be contrary to the interests of natural justice as it could deter individuals from bring claims. He confirmed that the Claimant felt passionately about this claim and whether to proceed with the claim was a judgment call for the Claimant to make. Syeds were his advisers and should not be penalised for supporting a claim he wishes to make. Mr Hussein confirmed that the Claimant had not made a claim against the firm for negligence and was still supporting them. He had allowed them to refer to anything within the file which may assist.

There was no suggestion that the Claimant had refused to waive legal privilege in relation to his retainer.

10. The Respondent put the Claimant on notice of the limitation point in its response and by letter dated 5 April 2017, which warned the Claimant that it would seek an order for costs if the Claimant did not withdraw his claim.

The Law

11. A tribunal or employment judge can make a wasted costs order against a representative in favour of any party (the receiving party) (rule 80).
12. A wasted costs order:
 - a. May order the representative to pay the whole or part of any wasted costs of the receiving party.
 - b. May disallow any wasted costs otherwise payable to the representative, including an order that the representative repay to their client any costs that have already been paid.
 - c. Must state the amount to be paid, disallowed or repaid (Rule 81.)
13. For these purposes, a representative:
 - a. Includes a party's legal or other representative or any employee of such representative.
 - b. Does not include a representative who is not acting in pursuit of profit with regard to the proceedings. A person acting on a contingency or conditional fee arrangement is considered to be acting in pursuit of a profit. Rule 80(2)).
14. A wasted costs order may require a party's representative to pay all or part of any wasted costs of any party, including those of their own client. This may involve a representative repaying costs which the client has already paid to them (rule 81).
15. "Wasted costs" means either of the following:
 - a. Any costs incurred by a party as a result of any improper, unreasonable or negligent act or omission on the part of a representative.
 - b. Any costs incurred by a party that, in the light of any improper, unreasonable or negligent act or omission on the part of a representative occurring after the costs were incurred, the tribunal considers it unreasonable to expect that party to pay. (Rule 80(1)(a)-(b).)
16. The definition of wasted costs in rule 80 is the same as that set out in section 51(7) of the Senior Courts Act 1981 that applies in the civil courts. The Court of Appeal in *Ridehalgh v Horsefield and another [1994] Ch 205* set out a three-stage test that should be followed when a wasted costs order is being considered:
 - a. Did the representative act improperly, unreasonably or negligently?
 - b. If so, did that conduct result in the party incurring unnecessary costs?
 - c. If so, is it just to order the representative to compensate the party for the whole or part of those costs?
17. The Court of Appeal also considered the type of conduct covered by section 51(7) of the Senior Courts Act 1981 (in the case of members of the legal profession):
 - a. Improper conduct. This includes, but is not limited to, behaviour that would result in disbarment, striking off, suspension from practice or other serious professional penalty.

- b. Unreasonable conduct. This is used to describe conduct that is designed to harass the other side (in a vexatious manner), rather than progress the case.
 - c. Negligent conduct. This should be considered in an untechnical way, as a failure to act with the competence reasonably expected of ordinary members of the legal profession.
18. The Court of Appeal also gave the following general guidance which was cited before the EAT in *Mitchells Solicitors v Funkwerk Information Technologies York Ltd UKEAT/0541/07*:
- a. The wasted costs jurisdiction should be exercised with great caution and as a last resort.
 - b. A wasted costs order should only be made if the court or tribunal is satisfied that the conduct of the impugned representative can properly be characterised as improper, unreasonable or negligent.
 - c. A legal representative, solicitor or counsel, should not be held to have acted improperly, unreasonably or negligently simply because they have acted for a party who pursues a hopeless case.
 - d. A tribunal can only make a wasted costs order in such a case if it is shown that:
 - i. the legal representative has presented a case which they consider is bound to fail; and
 - ii. in doing so, they have failed in their duty to the court and the proceedings amount to an abuse of process.
 - e. The tribunal must, when deciding whether to make a wasted costs order, take into account that, unless the representative's client waives privilege, the confidence between client and representative is likely to prevent the representative from explaining why they have pursued their client's case as they have.
 - f. It must be shown that the representative's conduct that is complained of has caused the incurring of unnecessary costs.
 - g. The court or tribunal must exercise a discretion at two stages. First when considering whether the application for costs is justified and proportionate in the circumstances of the case. If it decides that it is, the court or tribunal must then conduct a hearing to decide whether the requirements for an order have been met. If it decides that they have been, the court or tribunal must then decide whether or not to make an order, exercising its discretion.
19. The tribunal or employment judge may consider the representative's ability to pay when deciding whether to make a wasted costs order and, if so, how much the order should be for (rule 84)

Decision

20. My starting point is Rule 80 itself which provides the power to order a party's representative, in this case Syeds, to pay costs incurred by the Respondent. I am guided by the three stage test in *Ridehalgh*:
- a. Did the representative act improperly, unreasonably or negligently?
 - b. If so, did that conduct result in the party incurring unnecessary costs?
 - c. If so, is it just to order the representative to compensate the party for the whole or part of those costs?

21. The Respondent purports that the Claimant's representative's conduct was negligent. This should be considered in an untechnical way, as a failure to act with the competence reasonably expected of ordinary members of the legal profession.
22. In this case the negligent conduct which the Respondent contends was the failure to send the claim to the Tribunal in a manner which would ensure it reached the Tribunal within the limitation period, and to contact the tribunal office on 27 January to ensure it had arrived. It concerns me that the Grounds responding to this application and Mr Hussein in his oral submissions suggest that the claim form was not in fact posted on 26 January as had been put forward at the hearing before me by Syeds on 27 April, and that in fact the claim form had not been posted until 27 January 2017. If that was the case then that might explain why Syeds did not check with the Tribunal office whether it had been received as the Tribunal office would have been closed on Saturday 28 and Sunday 29 January.
23. When a solicitor is instructed on a fee paying basis, the responsibility lies with them to ensure the claim is submitted in time. As set out in my Written Reasons dismissing the claim, the limitation period expired on 29 January. Syed had a number of different ways that they could have lodged the claim with the Tribunal and chose to do so by post. They could have lodged the claim on line or hand delivered it to a local nominated office. In deciding to lodge it by post so close to the limitation date and then failing to check that it had arrived is in my view outside the standards of competence expected of ordinary members of the legal profession. For any solicitor who practices in employment law, the very strict limitation requirements in respect of claims of unfair dismissal is a well-known and important principle and one which any competent solicitor should be aware of. I consider therefore that Syed Solicitors have acted negligently for the purposes of this application. I note also the failure by Syed to engage in communication with the Respondent's representatives prior to the hearing on 27 April 2017 and then at the hearing itself when they provided no evidence to support their contention that the claim form had been sent by recorded delivery on 26 January as they suggested. The Claimant's case was presented on the basis that the claim had been posted on 26 January by recorded delivery. The Respondent and the Tribunal spent some time at the hearing attempting to ascertain whether the Claimant was seeking to adduce any evidence to support his application that the claim had in fact been sent on 26 January and by recorded delivery (evidence which was never forthcoming), including adjourning hearing in order that Mr Syed himself could attend to give evidence. The failure to adduce any evidence to demonstrate that it had not been reasonably practicable to present the claim in time when the burden was on the Claimant was also in my view negligent being outside the standards of competence of a reasonable solicitor.
24. I now go on to consider whether such conduct caused the Respondent to incur unnecessary cost.
25. Mr Hussein suggests that even if his firm has been negligent, that the Respondent's costs would have been incurred in any event. He suggests this because he considers that a reasonable solicitor would not have advised his client to withdraw the claim, rather, that the client should proceed because the application may be successful. He relies upon the three points he raised in his submissions and which I have summarised above.

26. Firstly he suggests that the overriding objective requires flexibility on the part of the Tribunal and because the claim was only one day late a judge might on the day exercise some discretion. It seems to me that Syeds have had little regard to the law which relates to applications for claims of unfair dismissal to be considered out of time and particularly the burden on the Claimant to show that it was not reasonably practicable to present the claim in time. In this case they presented no evidence on behalf of the Claimant until I adjourned the hearing to allow them to do so. Even then no evidence was produced other than Mr Syed's oral evidence when he was not the person who had posted the claim form. In those circumstances it is difficult to see how the Claimant could possibly show that it had not been reasonably practicable to present the claim in time.
27. Secondly Mr Hussein submits that if the matter had been so clear cut the Tribunal would not have accepted the claim or would have struck it out at an early stage. The Tribunal makes its decisions based upon the evidence which it is presented with. During the proceedings the Tribunal would have assumed that the Claimant would come to the hearing with evidence to demonstrate why it wasn't reasonably practicable to present the claim in time. The fact is that the Claimant did not produce such evidence, indeed his counsel indicated at the outset of the hearing that they were not seeking to argue that point other than in relation to the Tribunal's central office not being able to accept recorded delivery letters on a Saturday.
28. In determining the claim I have had regard to part 6 of the CPR Rules and Practice Directions and the principles in Consignia v Sealy [2002] EWCA Civ 878. The Rule 4(2) of the Rules of Procedure refers to time limits within the Employment Tribunal Rules of Procedure. The time limits which are relevant to the claim of unfair dismissal are set out in the Employment Rights Act 1996 section 111(2). As such this does not assist Syed Solicitors as they should have been aware of this and advised their client that this would not assist in his claim.
29. Based upon these points, it would have been incumbent upon a solicitor with knowledge of employment law to advise his client that he would be unable to successfully demonstrate that the Tribunal had jurisdiction to consider his claim when no relevant evidence is to be put forward. As such at the date upon which the Claimant received the letter from the Respondent making the application to strike out with the supporting grounds and Syeds determining that there was no evidence which could assist the Claimant, any further pursuit of the claim has in my judgment resulted in the Respondent incurring unnecessary costs which has come about as a result of Syed's negligence.
30. Finally I must consider whether it is just to order the representative to compensate the Respondent for the whole or part of those costs?
31. In doing this I have considered each of the factors in the Mitchell above. Particularly I am aware that a solicitor should not be penalised for a Claimant pursuing a case which may be hopeless. Further that I should exercise particular care where there is a risk that the representative may be prevented from putting forward a full defence because his client may not have waived privilege in relation to their retainer. Mr Hussein referred to the principle that to award costs against his firm would be contrary to the interests of natural justice as it could deter individuals from bringing claims. He confirmed that the Claimant felt passionately about this claim and whether to proceed with the claim was a judgment call for the Claimant to make and Syeds as his advisers should not be penalised for supporting a claim he wishes to make. Mr Hussein confirmed that

the Claimant had not made a claim against the firm for negligence and was still supporting them. He had allowed them to refer to anything within the file which may assist. There was no suggestion that the Claimant had refused to waive legal privilege in relation to his retainer.

32. Having regard to the principles in Mitchell where a Claimant insists on pursuing a hopeless case, a tribunal can only make a wasted costs order if it is shown that the legal representative has presented a case which they consider is bound to fail; and in doing so, they have failed in their duty to the court and the proceedings amount to an abuse of process.
33. In my judgment delivered orally and confirmed in my written reasons, I stated that if there had been evidence which I could accept that the claim had been presented on 26 January by recorded delivery, I would have considered that as there was no one at the Tribunal office on a Saturday (which in the postal rules is classed as a normal working day) to sign for the letter, it would not have been reasonably practicable to submit the claim in time. No such evidence was produced and I determined that the Tribunal had no jurisdiction to hear the claim. However I am further concerned that it would appear from the oral and written submissions presented by Mr Hussein that Syeds are now suggesting that the claim form was posted on 27 January and not by recorded delivery. Applying the normal postal rules, there was then no prospect that the claim could have arrived on time as it would have arrived on Sunday 29 January which was a non-working day.
34. I have taken into account that the Claimant states that he gave instructions to proceed having discussed the case with Syeds. I consider however that in these circumstances this is a case where the principles in Mitchell above have been met and that it is just and equitable to award costs against Syeds. I have heard the representations made by Mr Hussein concerning the amount of the costs and order that they pay the Respondent's legal costs in the sum of £3600 which I consider is an appropriate amount having reviewed the costs incurred by the Respondent from the date of their application to strike out on 4 April 2017. I have had no representations from Syed's as to their means and assume that they have no issues in paying the amount ordered.

Employment Judge Benson

Signed: 17 October 2017

Sent to the parties on:

17 October 2017

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