



EMPLOYMENT TRIBUNALS

Claimant: Ms A. Parrish

Respondent: Olive Catering Services

Tribunal: Midlands West (on papers)

On: 14 October 2024

Before: Employment Judge Power

Representation

Claimant: Not required to attend, no representations received

Respondent: Not required to attend

COSTS JUDGMENT

The respondent's application for costs made on 19 July 2024 fails and is dismissed.

REASONS

Background

1. A preliminary hearing took place on 19 July 2024 at which the claimant's claim was struck out for non-compliance with an order of the Tribunal (Rule 37(1)(c)) and that it had not been actively pursued (Rule 37(1)(d)). The Tribunal declined to strike out on Rule 37(1)(a) grounds that the claim had no reasonable prospects of success. The Tribunal gave its Judgment at the preliminary hearing on 19 July 2024. Judgment was sent to the parties on 24 July 2024 with reasons for the Tribunal's decision. I need not repeat those here.
2. The respondent made an application for costs on 19 July 2024. The Tribunal notified the parties that it was minded to consider the application

on the papers. The Tribunal gave the parties an opportunity to object and received no objections. The claimant was directed to provide any written representations as to why the application should not be granted by 5 August 2024. There was no response.

3. The respondent's costs application dated 19 July 2024 states that: the respondent's representative sent the claimant costs warning letters on 15 March 2024 and 18 April 2024; the claimant ignored these warnings; the claimant did not reasonably pursue the claim or comply with the Tribunal orders, which incurred the respondent unnecessary and wasted time and cost and that the claimant provided no justification or reasonable explanation for her failure to comply or pursue the matter; the claimant's failure to attend at hearing on 19 July 2024 was unreasonable behaviour; the claimant was warned of the risk of costs and recommended to seek advice.
4. The respondent's costs application includes a schedule of the respondent's costs incurred since the start of the claim. The total claimed is £1925 plus VAT, broken down as follows:

*"- Drafting the response:1 hr x £200+VAT per hour = £200+Vat.
- Correspondence in the case:2hrs x £200+Vat per hour =£300+Vat.
- Preparing bundle: 0.5hrs x £200+vat per hour = £100+Vat.
- Preparing for April 2024 hearing:1.5hrs x £150+vat per hour =£225+Vat.
- Preparing for July preliminary hearing:2 hours x £200+Vat per hour = £400+vat.
- Attending hearing: 3 hours x £200+Vat per hour = £600+Vat."*

5. The application enclosed copies of the costs warning letters sent by the respondent's representative to the claimant. The letter sent on 15 March 2024 states:

"As you are aware the respondent has applied to strike out your claim on the grounds that it has no reasonable prospects of success, it is not being actively pursued due to your failure to comply with the directions for a hearing, and your delay in complying with direction amounting to unreasonable conduct... Our client is confident your claim will be struck out for the above reasons... Our client is willing to enter a COT3 agreement subject to the following terms: 1. Withdrawal of your tribunal claim. 2. Waiver of all other claims 3. Our client not claiming costs against you..."

6. The letter sent on 18 April 2024 summarises the background from the respondent's point of view and states:

"Therefore your case has no prospect of success and it has not been actively pursued as you have ignored all previous correspondence [from] myself and the Tribunal. The respondent will be making an application for costs [a breakdown follows]. In total this equates to £1,125 + Vat. This cost has been unnecessarily incurred by bringing a claim that has no prospect of success. The respondent has invited you on several occasions to withdraw this claim and has received no response. This has incurred additional correspondence time and cost. The respondent will be making

an application for costs upon successfully defending the claim on Monday. If you have not already done so I would recommend you seek legal advice on your claim and this email...

7. The email address used by the Tribunal to send the Judgment with reasons and the costs application to the claimant is that held on the Tribunal file as her contact email address. She has sent two emails to the Tribunal in recent months from that address, one on 26 April 2024 which stated: *"I would like to apologise for the delay and any inconvenience caused by my delay in getting in touch, if possible I would be very grateful if I could ask for another hearing date within a few months, due to still being out of work and being unwell over the last few months I have got behind"* and a further email on 19 July 2024, in response to an email sent to her by the Tribunal on that date stating that the start time of the hearing was being delayed until 10.30 to give her an opportunity to join and warning her that the hearing might proceed in her absence. Her response, sent at 10.54 am on 19 July 2024 read *"I do apologise for not attending the hearing this morning. I've only just finished work and have not looked at my emails in till now. I do need a bit more time and need to contact acas for advice in producing evidence. If this is possible."* She made no attempt to join the hearing. There is no indication that the claimant failed to receive correspondence from the Tribunal and I am therefore satisfied that the claimant has had reasonable opportunity to consider the Judgment with reasons and the costs application.
8. The claimant made no representations in response to the respondent's costs application, despite being given reasonable opportunity to do so.

Law

9. The Tribunal Rules enable a legally represented party in employment tribunal litigation to make an application for an order for costs.
10. When considering whether or not to award costs, the relevant tests (known as the "threshold test") which the Tribunal must apply are found in Rule 76 which says:
 - (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 otherwise 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;*

....
 - (2) *A Tribunal may also make such an order where a party has been in breach of any order ..."*
11. The Tribunal must consider an application in three stages:
 - a. I must first decide whether the relevant threshold test is met.

- b. If I am satisfied that the relevant threshold test has been met, I should then decide if I should exercise my discretion to award costs, noting that the Rules say “may” rather than “must”.
 - c. I should then decide the amount of the costs to be awarded.
12. Even if one (or more) of the grounds for awarding a costs order is made, the Tribunal is not obliged to make an order. Rather, it has a discretion whether or not to do so.
 13. A factor relevant to the exercise of the Tribunal’s discretion may be whether there has been any warning of a risk of costs, although such a warning is not a prerequisite to the making of an order; nor is it a prerequisite that the receiving party must have put the paying party on notice of any application.
 14. Whether or not the claimant is represented can also be a relevant consideration in deciding whether to award costs against them, although the fact that a party is unrepresented is no barrier to an award of costs being made.
 15. Rule 84 is also relevant. It provides that the Tribunal may have regard to the paying party’s ability to pay in deciding whether to make a costs order. The Tribunal is not required to have regard to the means of the party against whom the order is made. A Tribunal can make an award even if the paying party has no ability to pay, provided that it has considered means. This must be done even when the paying party does not raise the issue of means directly and the Tribunal must say whether or not it has taken the paying party’s means into account.
 16. Case law provides regular reminders that costs remain the exception not the rule in Employment Tribunal litigation.

Conclusion

17. The reason that the claimant’s claim was struck out was because she did not comply with Tribunal Order/s and she was not actively pursuing her claim. I did not strike out the claim due to scandalous, unreasonable or vexatious conduct by the claimant. I did not strike out the claim on the grounds that it had no reasonable prospect of success. In determining whether the claim had not been actively pursued, I considered that there was an inordinate and inexcusable delay giving rise to an injustice to a party. I do not know the reasons why the claimant has failed to respond to correspondence or to comply with Case Management Orders. I considered that there are three possible explanations.
18. Firstly, that she presented the claim to cause difficulty and inconvenience for the respondent and never intended to comply with any Orders. This would clearly be unreasonable behaviour. The threshold for such a finding is very high and there is no evidence before me to support such a finding.
19. Secondly, that the claimant did not receive correspondence from the Tribunal or the respondent. As the claimant clearly did receive correspondence from the Tribunal in April and July and responded by

emails on 26 April 2024 and 19 July 2024, I do not consider that this is the likely explanation.

20. The final possibility is that the claimant may have been unable to progress the litigation because of illness. The correspondence from the claimant dated 26 April 2024 indicated that she had been unwell. Had she been so unwell that she could not engage in Tribunal-related correspondence, I would have expected her to ask a friend or relative to contact the Tribunal and the respondent with this information. This was not the case, nor was any medical evidence provided. It is however apparent from her correspondence that she did not know what to do as regards the Tribunal process and was seeking advice. Whilst this is not evidence that she was so unwell she could not participate in the Tribunal process, it does indicate that she was struggling to comprehend what was required of her, and I therefore consider, given the previous correspondence from her which refers to her ill health, that this is the likeliest explanation.
21. Whilst this is an explanation for the claimant's failure to respond to correspondence, comply with Case Management Orders and actively pursue her claim, it does not excuse her conduct. Having initiated a claim against the respondent, the claimant must ensure that she engages with the process and does what is required of her to actively pursue the case. Not to do so constitutes unreasonable conduct and I therefore determine that the threshold test in Rule 76(1)(a) for unreasonable conduct is met in this case.
22. Having decided that the threshold test is met, I consider whether it is in the interests of justice to make a costs award against the claimant, taking into account all the circumstances of the case. I have decided that, although finely balanced, making a costs award is not in the interests of justice in this case, for the following reasons:
 - a. Employment Tribunals are understood to be a no-costs jurisdiction. While costs can be awarded, this is an exception rather than the rule. This general position was in my mind when considering this matter. An award of costs does not automatically follow even when the threshold test at Rule 76(1)(a) is met.
 - b. The claimant was not represented. The way in which she has conducted this claim indicates that she does not have experience of Employment Tribunal litigation and I conclude it is unlikely that she has knowledge of the Tribunal's costs rules.
 - c. Although the respondent wrote to the claimant twice to warn of the risk of costs, the claimant did not respond. It follows that this was because she did not understand the significance of those letters. The letters sent by the respondent do not expressly warn the claimant that her failure to respond to correspondence, or indeed to the Case Management Orders of the Tribunal, could result in a costs award being made against her.
 - d. I also took into account that I had no information as to the claimant's means to pay a costs award. This does not prevent me

from making such an award. It did however weigh heavily against an award being made in these particular circumstances.

Employment Judge Power
14 October 2024