



EMPLOYMENT TRIBUNALS

Claimant
Mr. J Staples

Respondents

v Restore Plc (R1)
Nottingham University Hospitals
NHS Trust (R2)

AT A COSTS HEARING CONDUCTED ON THE PAPERS

Heard at: Nottingham

On: 22nd May 2020

Before: Employment Judge Heap (Sitting Alone)

Representation

Claimant: No representations

First Respondent: Oral representations made on 28th February 2020

Second Respondent: Oral representations made on 28th February 2020

JUDGMENT ON COSTS

1. The Claimant is Ordered to pay to the First Respondent the sum of £4,132.80 in respect of their costs.
2. The Claimant is Ordered to pay to the Second Respondent the sum of £1,200.00 in respect of their costs.

REASONS

BACKGROUND & THE ISSUES

1. This hearing was listed for the purposes of determining an application for costs which had been made by the First and Second Respondents at a Preliminary hearing where I struck out the Claimant's claim against them both on the basis that it had no reasonable prospect of success. I could not deal with that application on the day of the Preliminary hearing because at the point that it was mentioned the Claimant elected to leave the hearing and did not return.
2. I therefore caused the Claimant to be sent a letter after the hearing setting out the basis of the costs applications of both the First and Second

Respondent and affording the Claimant a reasonable opportunity to make representations as to why no Order for costs should be made. That letter was dated 4th March 2020 and invited representations from the Claimant by no later than 19th March 2020. The Claimant has not made any representations in respect of the applications, either in accordance with that opportunity or at all.

3. Both Respondents were content to have these applications determined on the papers without the need for a further hearing and, as I have already observed above, the Claimant has been given an opportunity to make representations but he has elected not to do so.
4. He was sent a copy of the Notice of hearing for today but has still failed to make any representations, even outside the terms of my Orders made on 4th March 2020.

THE LAW

5. Rules 74 to 84 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (“The Regulations”) deal with the question of whether an Employment Tribunal should make an Order for costs.
6. Rule 76 sets out the relevant circumstances in which an Employment Judge or Tribunal can exercise their discretion to make an Order for costs and the relevant parts of that Rule provide as follows:

“When a costs order or a preparation time order may or shall be made

76.— (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.”*

7. In short, therefore, there is discretion to make an Order for costs where a party has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing or conducting of the proceedings. Equally, the discretion is engaged where a party pursues either a claim or defence which has no reasonable prospect of succeeding or, to put it as it was termed previously, where a claim or defence is being pursued which is “misconceived”.
8. With regard to unreasonable conduct it is necessary for the Tribunal to consider *“the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the Claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had.”* (**Barnsley Metropolitan Borough Council v Yerrakalva [2012] IRLR 78**)

9. It should be noted that merely because a party has been found to have acted vexatiously, abusively, disruptively or unreasonably or where a claim or response has no reasonable prospect of succeeding, it does not automatically follow that an Order for costs should be made. Once such conduct or issue has been found, a Tribunal must then go on to consider whether an Order should be made and, particularly, whether it is appropriate to make one. When deciding whether an Order should be made at all and, if so, in what terms, a Tribunal is required to take all relevant mitigating factors into account.
10. In accordance with Rule 84, a Tribunal is entitled to have regard to an individual's ability to pay any award of costs both in relation to the making of an Order at all, or the amount of any such Order. However, it is not a mandatory requirement that such consideration must automatically be given.

THE COSTS APPLICATION

11. The basis of the application of the First Respondent is that the claim against them had no reasonable prospects of success and also that it was unreasonable for the Claimant to continue to pursue a claim against the First Respondent in view of costs warning letters sent to him by their solicitors and the position outlined that he had no claim against them in law. It is said that those letters identified the problems with the claim and indicated that an application for costs would be made and invited the Claimant to resolve the matter by withdrawing the claim. It is further said that the Claimant did not engage with the costs warning letters or an earlier Order of Employment Judge Camp which required the Claimant to set out the basis of his claim. The Claimant had been signposted by the Tribunal to where he could source legal advice and it is said that he has had plenty of opportunity to do so. The First Respondent seeks their costs in the amount set out in their email to the Claimant of 28th February 2020 amounting to £5,1660.00 (the VAT exclusive sum being £4,132.80).
12. The Second Respondent seeks an Order for costs in respect of the costs of the Preliminary hearing of £1,200.00 (Counsel's fees) on the basis that it is said that the claim against them also had no reasonable prospect of success and, further, it amounted to unreasonable conduct for the Claimant to pursue the claim to the Preliminary hearing in light of an offer made in a letter from their solicitors of 26th February 2020 that he withdraw the claim in consideration for them not making any costs application.

CONCLUSIONS

13. I begin by considering whether the tests contained within Rule 76(1)(a) or (b) Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 are met.
14. The first question is whether the claim against either Respondent had no reasonable prospects of success. I can deal with that question in very short terms because the conclusion that I reached at the Preliminary hearing was to strike out the claim against both the First and Second Respondents on precisely those grounds. The first strand of the test is

therefore made out.

15. Alternatively, I am also satisfied that the Claimant's conduct was unreasonable in that – as I set out further below – he has never engaged in any material way with the basis upon which he said that he had a claim in law against either Respondent. Particularly, there was a detailed costs warning letter from the Second Respondent dated 26th February 2020 which set out why the Claimant had no claim against them; noted concerns raised by the Tribunal about him being unable to articulate his claim; set out details of the costs regime and the intention to make an application if he proceeded and offered the Claimant a way out by withdrawing his claim against them with no costs consequences. The letter suggested the Claimant seek legal advice and provide such adviser with a copy of the letter. The Claimant did not engage with that at all.
16. Similar letters were sent on behalf of the First Respondent dated 19th December 2019; 13th February 2020 and 28th February 2020. Again, the First Respondent set out why there was no claim against them in law, reminded the Claimant of the costs provisions and their intention to make an application and made an offer allowing the Claimant to withdraw without costs consequences. The Claimant did not engage with those letters either.
17. I am therefore satisfied that the first limb of the test for an Order for costs is made out either on the basis that the claim had no reasonable prospects of success or, alternatively, that his actions in pursuing the matter as far as the hearing amounted to unreasonable conduct.
18. However, that is not the end of the matter and I must be satisfied that it is appropriate to make a costs Order. The Claimant has offered up nothing in response to the applications of either the First or Second Respondents from which I could discern any mitigating factors such that it would not be appropriate to make a costs Order. It is not for me to guess what response the Claimant may have or what, if any, mitigating factors there might be and I remind myself he has been given ample opportunity to make representations both at the hearing before he left abruptly and thereafter by way of the Tribunal's letter of 4th March 2020.
19. In addition, I take in to account when determining that it is appropriate to make an Order for costs in favour of both Respondents the fact that the Claimant has never taken the opportunities afforded to him to engage with the basis upon which he said that he was entitled to a redundancy payment. The Claimant was Ordered by Employment Judge Camp to set out the basis of his claim but he failed to set out any proper basis upon which he advanced his claim. He was signposted by the Tribunal to sources of legal advice and, indeed, I understand that at the very least the Claimant had received some advice from a neighbour who was a solicitor. If that individual was not able to provide employment law advice, he or she would no doubt have been able to direct the Claimant to where he was able to obtain some and, in all events, the Tribunal provided him with sources where he could obtain free legal advice.
20. The Claimant was also aware from correspondence from the Tribunal that there was concern that he was unable to articulate the basis of his claim against the Respondents and that he would be required at the hearing to

do so. Given that position, letters from the Respondents urging him to seek legal advice and offering him a way out without costs implications, the Tribunal signposting him to sources of advice and the listing of a hearing to consider applications to strike out the claim, it was incumbent on him to engage properly with the basis upon which he said that he had a claim against the Respondents. He failed to do so. Those are factors, particularly absent any mitigating factors from the Claimant, that make it appropriate to make Orders for costs.

21. For all of those reasons, it is appropriate to make a costs Order in favour of both the First and Second Respondents.

THE AMOUNT OF THE COSTS ORDERS

22. The Claimant has not made any representations to suggest that the sums claimed are unreasonable nor do I consider them to be. Moreover, the Claimant has not provided any details of his means so as to allow me to take those matters into account and therefore I make Orders in respect of both the First and Second Respondents in the sums sought. Both of the Orders for costs are made in sums which are exclusive of VAT given that both Respondents are VAT registered.

Employment Judge Heap

Date: 9th June 2020

JUDGMENT SENT TO THE PARTIES ON

09/06/2020.....

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FOR THE TRIBUNAL OFFICE

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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