



THE EMPLOYMENT TRIBUNALS

Claimant
Mr S Parks

v

Respondent
Wunder Ltd

JUDGMENT

The Respondent's application for costs succeeds. An award of costs of £14,999.69 is made, payable by the Claimant to the Respondent.

REASONS

Background

- 1 By a claim form presented to the Employment Tribunal on 5 August 2016, the Claimant had brought complaints of unfair dismissal, breach of contract and for unpaid expenses against the Respondent. The Respondent defended the claim and also submitted an employer's contract claim.
- 2 At a case management preliminary hearing on 29 September 2016, at which the Claimant attended in person, the issues of the claim were clarified and the matter was set down for a 3 day hearing commencing 4 January 2017. This was subsequently postponed to 1-3 February 2017. The Tribunal had also issued standard case management orders for the preparation of the case by a letter of 11 August 2016.
- 3 The Claimant was in fairly regular contact with the Respondent's solicitor until around 9 November 2016, but thereafter all contact from the Claimant ceased.
- 4 The Respondent duly applied for an unless order from the Tribunal. The Tribunal sought comments from the Claimant in this respect but none were forthcoming.

- 5 On 16 January 2016, Regional Employment Judge Potter duly issued a “strike out warning”, informing the Claimant that she was considering striking out the claim because it had not been actively pursued and confirming to the Claimant that, if he wished to object to this proposal, he should give reasons in writing or request a hearing at which he could make them by 23 January 2017. No response from the Claimant was forthcoming.
- 6 On 26 January 2017, the Respondent’s solicitor noted this and sought to have the case struck out and also informed the Tribunal that the Respondent was intending to make an application for costs against the Claimant, which it stated it would (in the absence of any correspondence from the Tribunal to the contrary) do on the first day of the current scheduled full merits hearing of 1-3 February 2017.
- 7 By a judgment sent to the parties on 30 January 2017, Regional Employment Judge Potter struck out the claim in its entirety because it had not been actively pursued and confirmed that the hearing would proceed as listed to consider the Respondent’s costs application.
- 8 In an email to the Tribunal and the Claimant dated 30 January 2017, the Respondent briefly set out the basis for the costs application and enclosed a schedule of costs setting out the costs sought (totalling £18,672.19, inclusive of VAT).
- 9 On 31 January 2017 (the day before the hearing), by email of 13:24 to the Tribunal, copied to the Respondent, the Claimant applied to have the hearing postponed. This was primarily on medical grounds relating to him. The Claimant explained that he had a rare bone tumour (he had indicated in his original claim form presented on 5 August 2016 that he had a tumour and was receiving treatment) and that the seriousness of this meant that he was likely to lose his hand. He gave further medical details and enclosed an MRI scan which he said indicated the areas where the tumour was. He did not provide any medical evidence from a medical professional but indicated that he could obtain it if necessary.
- 10 Employment Judge Glennie refused the application to postpone on the grounds that the Claimant had not produced medical evidence showing he was unfit to attend the hearing and that it was not clear whether the Claimant was seeking only a postponement or also seeking reconsideration of the judgment striking out his claim. He indicated that the parties should attend the hearing the next day and that Claimant could then renew his application to postpone if so advised.
- 11 By a further email of 31 January 2017 to the Tribunal, copying in the Respondent, the Claimant renewed his application to postpone and confirmed that he was seeking to have the judgment striking out the claim reconsidered (he stated that he only learned of that judgment that day as a result of the Tribunal’s earlier email to him). He gave further medical details

but did not provide any evidence from a medical expert, although he indicated that he could provide it if given enough time.

- 12 The Claimant did not attend and was not represented at the hearing of 1 February 2017, which was before me. The Respondent was represented by Mr N Kennan of Counsel.
- 13 I do not repeat the notes of the discussion which took place at that hearing, which is set out in full in my note of that hearing sent to the parties on 2 February 2017. However, points to note from that included that Mr Kennan confirmed the employer's contract claim (for £8,183.40) was linked to the Claimant's claim and that, if the decision to strike out the claim was not overturned on reconsideration, the Respondent would not be pursuing the employer's contract claim.
- 14 Given the Claimant's absence and his emails indicating that he had a serious medical condition (and for the other reasons set out in my note of that hearing), I declined either to make a decision on the reconsideration application or to hear the Respondent's costs application that day, but stayed the claim until 15 March 2017 and made certain orders which were set out in the note and to which the Claimant's attention was specifically drawn in that note, relating to the provision of medical evidence. I do not repeat the detail of the order here (it is set out in full in my note of the hearing) but in summary the Claimant was required to provide the medical evidence and other information set out in the order by 15 March 2017.
- 15 No response was received from the Claimant either by the Tribunal or by the Respondent. On 30 March 2017, the Respondent informed the Tribunal (copying in the Claimant) that it had heard nothing from the Claimant and attached an updated schedule of costs in relation to its costs application, totalling £18,367.19 inclusive of VAT.
- 16 By letter to the parties of 10 April 2017, the Tribunal informed the parties that the stay of the claim had expired on 15 March 2017 and was therefore lifted; that there had been no compliance by the Claimant with the Tribunal's Order of 1 February 2017 for the provision of medical evidence, nor any communication from the Claimant in that respect and that therefore, unless the Claimant complied with the order by 24 April 2017, his application for reconsideration of the Judgment striking out the claim would be refused; and the Tribunal would then give consideration to the Respondent's outstanding costs application.
- 17 No response was received from the Claimant.
- 18 By letter of 19 May 2017 to the parties, the Tribunal confirmed that no response had been received and that, therefore, as referenced in its letter of 10 April 2017, the Claimant's application for reconsideration of the decision to strike out the Claimant's claim on the basis of it not having been actively

pursued was refused, noting that that application in itself had not been actively pursued. In that letter, the Tribunal noted that the Respondent had not yet provided the full basis on which it was making its costs application and that, if it wished to pursue it, it should set out the basis for the application in writing to the Tribunal by 2 June 2017.

- 19 The Respondent duly did so on 2 June 2017, copying in the Claimant to its communication to the Tribunal.
- 20 By letter of 8 June 2017 to the parties, the Tribunal informed the Claimant that, if he had any comments on or sought to oppose the Respondent's costs application, he should forward the comments to Tribunal and the Respondent within 14 days and should include any relevant information regarding his ability to pay the costs sought and that, thereafter, the application would be determined by the Tribunal on the papers (the Respondent had requested that it be dealt with on the papers).
- 21 No response was forthcoming from the Claimant.
- 22 The Respondent sent a further email of 21 June 2017 to the Tribunal, copying in the Claimant. I refer to this in more detail below but, in summary, it attached evidence of regular online blogs written by the Claimant in his new role as Managing Director of his company Convivio Team Ltd, which the Respondent maintained indicated that, if the Claimant could do this, he was quite capable of participating properly in the Tribunal proceedings and at the very least capable of communicating with the Respondent. The Respondent asked that these documents be taken into account in determining the costs application. As noted, the email was copied into the Claimant.
- 23 No response was received by the Tribunal from the Claimant.
- 24 The file was not put before me thereafter until September 2017. In the light of the previous correspondence and the fact that, despite in the end having had months to do so, the Claimant had not responded at all to the application for costs, I decided to determine the application on the papers on the basis of the information in front of me.

The Law

- 25 The Tribunal's powers to make awards of costs are set out in the Employment Tribunal Rules of Procedure 2013 at Rule 74-84. The test as to whether to award costs comes in two stages:-
 1. Firstly, has a party (or that party's representative) 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 did the claim or response have no reasonable

prospect of success? If that is the case, the Tribunal must consider making a costs order against that party.

2. Secondly, if that is the case, should the Tribunal exercise its discretion to award costs against that party? In this respect the Tribunal may, but it is not obliged to, have regard to that party's ability to pay.

The Costs Application

26 The basis of the Respondent's application was that the Claimant had acted disruptively or otherwise unreasonably in the way that the proceedings had been conducted for a number of reasons:-

1. Since 28 October 2016 up to 31 January 2017 (when the Claimant sent the two emails after his claim had been struck out) the Claimant ceased all contact with the Respondent. This was despite the Respondent making a number of attempts to contact him in order to continue to prepare the case for the final hearing. These attempts were more particularly set out in the Respondent's application for an unless order.
2. Since the two emails referred to on 31 January 2016, the Claimant had again and to date ceased all contact with the Respondent's representative and the Tribunal.
3. The Claimant had breached the case management orders of 11 August 2016.
4. The Claimant had breached the Tribunal orders of 1 February 2017 relating to medical evidence.
5. As a result of the Claimant's application for the postponement of the final Tribunal hearing on 1 February 2017, which was ultimately postponed, the Respondent incurred (because of the late nature of the postponement) another £600 of solicitor's fees and £1,250 of barrister's fees.

Stage 1

27 Other than the assertions made in the Claimant's emails of 31 January 2017 and the reference in the claim form, there is no evidence before me to show that the Claimant has a medical condition which prevents him from participating in Tribunal proceedings or even from making contact with the Respondent and the Tribunal (in particular there is no evidence from a medical professional). In the absence of that, and given the numerous opportunities which the Claimant has had to communicate with the Tribunal and to provide such evidence, I find that there was no medical reason or other good reason why the Claimant could not comply with the Tribunal's

orders, prepare for the hearing, make contact with the Tribunal and the Respondent, or make his application to postpone in a timely manner (to the extent that it was reasonable to make such a postponement application at all). These failures are all examples of unreasonable conduct and the above allegations of unreasonable conduct are therefore all made out.

- 28 In addition, I also take into account the other evidence which is before me, namely the records of the regular online blogs written by the Claimant in his new role as Managing Director of his company Convivio Team Ltd. The Claimant was copied into the Respondent's email of 21 June 2017 sending these to the Tribunal and so has had the opportunity to comment on them, but, three months later, there is still nothing from him commenting on them and therefore I accept them as they are presented to me by the Respondent. Those attachments indicate that the Claimant was writing these blogs in November and December 2016, after the time when he ceased to communicate with the Respondent. Furthermore there are also blogs from 2017, including one dated 18 March 2017, three days after the Claimant was due to comply with the Tribunal order of 1 February 2017 requesting the disclosure of medical evidence. The blogs demonstrate that the Claimant was and is actively involved in managing a start up company and is also capable of writing lengthy detailed blogs on a regular basis at the same time as he indicated to the Tribunal and the Respondent in his emails of 31 January 2017 that due to pressures derived from a serious medical illness and associated stress he had been completely unable to prepare for the case or deal with correspondence etc. The blogs are at odds with this assertion. I fully accept the Respondent's submission that, notwithstanding the absence of medical evidence, these blogs indicate that the Claimant was likely to have been able to participate properly in the Tribunal proceedings, including collating and exchanging relevant documents and writing a witness statement, and that the Claimant was capable of communicating with the Respondent and the Tribunal.
- 29 For these reasons, in terms of Stage 1 of the test in relation to costs, I consider that the Claimant did behave disruptively and unreasonably in all of the respects which the Respondent maintains. I am therefore obliged to go on to Stage 2 of the test and consider whether or not to exercise my discretion to make an award of costs.

Stage 2

- 30 The costs sought by the Respondent include all of its costs in defending the claim. Given that the Claimant stopped communicating at a relatively early stage and behaved unreasonably from that point, the vast majority of these costs were incurred after the Claimant started behaving unreasonably. However, because of the Claimant's unreasonable behaviour over a lengthy period, from early November 2016 to date, this has meant that the entirety of the costs of the Respondent in defending this claim have been incurred unnecessarily. I therefore consider that, in principle, the Respondent should

be reimbursed for its costs in defending the whole of the claim and not merely those incurred from November 2016 onwards.

- 31 The Respondent provided a very detailed schedule of costs in relation to the claim, setting out in detail the activities undertaken and the time spent on them. In terms of solicitor's costs, the work was done by a senior solicitor whose hourly rate was £250 per hour, which is not an unreasonable rate in relation to a senior solicitor. The total number of hours incurred was also not unreasonable, given the activities required and given that the Respondent had to prepare fully for a three day hearing including preparing the documents and drafting witness statements and thereafter had to spend a lot of time chasing the Claimant in relation to preparation for the hearing and the Tribunal orders which the Claimant did not comply with. The total costs incurred by the Respondent's solicitor came to £12,687.50 (exclusive of VAT), all of which I consider were reasonably incurred.
- 32 Furthermore, because of the late postponement application (which was unreasonable, because it could have been made earlier, to the extent it even needed making at all), the Respondent incurred its full junior counsel's fees of £2,100.00 for the Hearing. This fee for a three day hearing is not unreasonable for a junior barrister. I therefore consider that this too was properly incurred.
- 33 In addition, disbursements of £212.19 were incurred for the plane ticket of one of the Respondent's witnesses who had to fly from Finland to London to attend the Hearing. This was a necessary cost in order to defend the claim and was therefore reasonably incurred.
- 34 In addition to the above fees, the Respondent has also sought to recover by way of costs the VAT payable on those fees. No submissions have been made in this respect. However, judging by the description of the Respondent in the response form (a UK Company specialising in website construction and digital marketing services), it does not appear to me likely that the Respondent falls into that category of business which is unable to recover the VAT it incurs when paying for services. If it can recover that VAT, I do not consider it appropriate that the VAT should be included in the costs award and therefore I do not include it.
- 35 The total of costs recoverable is therefore £12,687.50 (solicitor's fees), £2,100.00 (counsel's fees) and £212.19 (disbursements), which totals £14,999.69.
- 36 The Respondent has sought to recover the £160 Employment Tribunal fee which it paid to bring the employer's contract claim. However, in the light of the recent Supreme Court decision on Employment Tribunal fees in R (on the application of Unison) v Lord Chancellor [2017] UKSC 51, which found that the charging of such fees was illegal, it is not appropriate for the Tribunal to make an award of costs in this respect and the Respondent should look to

recover those fees directly from HM Courts and Tribunals Service under the system which it is expected to be putting in place for these purposes.

- 37 No submission has been made to me in relation to the Claimant's means and I do not therefore take the Claimant's means into account.
- 38 Even if I had taken them into account, I have no information before me to indicate that the Claimant would have any difficulty in paying the costs sought by the Respondent and so would not make any adjustments to the amount of costs to be awarded.
- 39 In summary, therefore, an award of costs is made of £14,999.69 payable by the Claimant to the Respondent.

Employment Judge Baty
22 September 2017