



Case Number: 2300377/2016

## EMPLOYMENT TRIBUNALS

BETWEEN

**Claimant**  
Mr M Kedziora

and

**Respondent**  
Servest Group Ltd

**Held in chambers on 9 May 2017**

**Employment Judge Wallis**

## JUDGMENT ON COSTS

1. This was a case where it was appropriate to make a costs order;
2. The Claimant is ordered to pay the Respondent £6,446 plus VAT as a contribution towards the Respondent's costs.

## REASONS

### ISSUES & FINDINGS

1. On 10 January 2017 the Claimant's remaining claims were struck out by Employment Judge Baron because the Claimant had failed to comply with an Unless Order.
2. The history of the matter is recorded in various case management orders and a useful snapshot is provided in the Reasons given by Judge Baron for the Unless Order, sent to the parties on 15 February 2017.
3. For convenience, I have reproduced below Judge Baron's Reasons in order to give a flavour of the history of this matter. I have retained the internal numbering of that document.

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4. 'On 10 January 2017 I made an Order in the following terms:  
1 The Tribunal orders that by 12 noon GMT on Friday 13 January 2017:

- 1.1 The Claimant provides to the Respondent his own witness statement and also a copy of the statements of any other witnesses he intends to call to give evidence on his behalf, and
- 1.2 That he notifies the Tribunal that he has complied with the above Order.
- 2 The Tribunal further orders in accordance with rule 38(1) that unless the Claimant complies with the order in paragraph 1.1 above by the date stated above then the claim shall be struck out on that date without further order.
- 1 The Claimant did not comply with the Order and the claim was therefore automatically struck out. The Claimant has asked for reasons for the making of the Order. It is necessary to set out something of the history of these proceedings.
- 2 The claim form was presented on 18 January 2016. There was a preliminary hearing before Employment Judge Wallis on 15 June 2016. In summary leave to amend the claim was granted, certain heads of claim were struck out and a deposit order was made in respect of some heads of claim. The remaining claims are of race discrimination and victimisation. Judge Wallis also made case management orders. In particular Judge Wallis ordered that written witness statements be prepared in the usual way, and that they be exchanged on 28 October 2016. The hearing was listed to commence on 16 January 2017 with three days allocated.
- 3 On 14 July 2016 the Claimant applied to the Tribunal an extension of time to comply with orders as to the provision of a schedule of loss, disclosure and inspection because he wished to appeal the judgment of Judge Wallis. Such extensions were granted. No mention was made of witness statements. An appeal was made to the Employment Appeal Tribunal on 1 August 2016.<sup>1</sup> Although out of sequence I note that Simler J decided on the preliminary sift that permission to appeal be refused, and the Claimant has subsequently exercised his right to have an oral hearing.
- 4 On 6 September 2016 the Claimant applied for an order that the Respondent provide six 'items' of evidence listed in a table. That application was refused by Judge Wallis on 8 October 2016 on the basis that 'the documents sought do not appear to relate to the claims as they stand currently.' The Claimant then sought a stay of the proceedings pending the outcome of the Claimant's appeal to the Employment Appeal Tribunal. That application was also refused on 18 November 2016.
- 5 Then on 22 November 2016 the Claimant applied for an order as follows:

Respondent to provide me with his witness statement which he should exchange on 14<sup>th</sup> November. If not I am applying to not recognize them as a evidence because it is broken a principal in law called all parties are equal

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<sup>1</sup> Appeal UKEATPA/0512/16

and fair trial. I can't share with respondent my witness statements because I need to wait to be my appeal, from Judge Wallis decision, allowed.

- 6 The Respondent objected to the order sought. Judge Wallis refused the application on 12 December 2016 and informed the Claimant by a letter of that day that the Claimant must be ready to exchange statements by 4 pm on 21 December 2016, and that failure to do so would result in the judge considering striking out the claim.
- 7 The Claimant then appealed the decision of Judge Wallis of 8 October 2016<sup>2</sup> and also her decision to refuse to stay the proceedings.<sup>3</sup>
- 8 On 23 December 2016 the Respondent's solicitors wrote to the Tribunal stating that they had sent two emails to the Claimant on 21 December 2016 to agree an exact time for the exchange of witness statements on that day. A reply was sent on 22 December 2016 as follows:

I must disappoint you. As you probably already know I had appeal from, I my opinion wrong, Judge Wallis's decision to refuse to stay the claim till EAT decided to allow or dismiss my appeal. What is more Can I ask you to provide my date till when you will provide me requested information about Gary Lockwood (if he had a disciplinary) and how much had earn Nickie (my comparator).
- 9 On 9 January 2017 the Claimant sent a further email asking for an Order that the Respondent provide further information and that the claim be stayed to enable the Respondent to provide such information. There has not been a specific response from the Tribunal to that application.
- 10 In reply to a query from the Tribunal on 9 January 2017 the Respondent's solicitors replied on the following day that the Claimant was still refusing to exchange his witness statement. I concluded that the making of the Order set out above was appropriate.
- 11 The making of an Order that potentially has the effect of the claim being dismissed is not to be undertaken without proper consideration, nor without proper grounds. In this case the remaining claims which were to be decided by the Tribunal were of race discrimination and victimisation, and in such circumstances the Claimant must prove facts from which the Tribunal could reasonably conclude that there had been unlawful discrimination and/or victimisation. I noted that when setting out her reasons for making a deposit order Judge Wallis had stated that 'the claims were difficult to understand and at times incoherent. The Claimant was reluctant to accept guidance and found it almost impossible to answer a straight question with a straightforward answer.' Thus clarity was still needed.
- 12 In my judgment what has occurred here justified the making of an Order giving the Claimant one last chance to comply with the Order made by Judge Wallis

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<sup>2</sup> Appeal UKEATPA/0751/16. HHJ Eady ordered on the preliminary sift that no further action be taken on the appeal.

<sup>3</sup> Appeal UKEATPA/0801/16

on 15 June 2016 requiring an exchange of witness statements. Despite that various appeals that the Claimant has made to the EAT he has not appealed against the order to exchange witness statements. He has simply refused to comply with it. Indeed at one stage as mentioned above the Claimant requested that the Respondent supply its witness statements first.

- 13 The Tribunal makes case management orders and expects them to be obeyed. Further, there must be a serious risk that a fair trial would not have been possible without the Respondent knowing in advance exactly what evidence the Claimant was to put forward. Discrimination claims are serious matters for both parties, and a respondent is entitled to know in advance exactly what is to be alleged.'

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5. The Claimant's subsequent appeals to the Employment Appeal Tribunal were dismissed on 20 April 2017 and leave to appeal to the Court of Appeal was refused.
6. By an email of 13 January 2017 the Respondent applied for costs. When the application was referred to Employment Judge Wallis on 15 February 2017, it was apparent that the attached schedule was not received by the Tribunal and they were asked to re-send it by letter of 28 February 2017.
7. That letter also directed that the Respondent could add any further details of the application by 10 March 2017, and that the Claimant could then respond in writing by 7 April 2017. The Judge was then to consider the application in chambers, without a hearing.
8. The application with the attachment was referred to the Judge on 24 April 2017.
9. Meanwhile, on 13 April 2017 the Claimant sent an email to the Tribunal office to ask whether a decision had been made about the Respondent's costs application. He said 'I would ask you about EJ Wallis decision (I didn't receive anything) to give Claimant an order to refund Respondent's legal costs? The application for such was proceed 7 April 2017.' I found that he was therefore aware of the application and the correspondence from the Tribunal. Nothing further had been heard from the Claimant at the time of writing this decision. Accordingly, it is assumed that he has decided not to take the opportunity to make any comments about the application.
10. The Respondent attached to the application a copy of the costs warning letter that had been sent to the Claimant on 21 April 2016, and copies of emails exchanged by the parties during the course of the proceedings. The Tribunal had made a deposit order, sent to the parties on 23 June 2016, which was issued with a costs warning. The Claimant paid the deposit. I was satisfied that from an early stage the Claimant was left in no doubt that he would be at risk of a costs application if he continued with his claims.

11. Directions had been made at the preliminary hearing on 15 June 2016 in respect of preparation for the hearing listed for 16, 17 and 18 January 2017. The Claimant failed to prepare and exchange witness statements, in fact he refused to comply with the order. This failure ultimately led to the Unless Order and the strike out of the remaining claims.
12. Meanwhile, the Respondent had complied with the Tribunal orders and had their witness statements prepared and ready to be exchanged.
13. The Respondent's application for costs was made on the grounds that the Claimant had acted unreasonably in the way that he had conducted proceedings. The application was quite properly restricted to the period from the preliminary hearing on 15 June 2016 to 13 January 2017, when the remaining claims were struck out and the hearing, due to start on 16 January 2017, was vacated.
14. The Respondent had supplied a costs schedule showing the work undertaken in that period. The total claimed was £14,126 plus VAT.

#### A BRIEF SUMMARY OF THE RELEVANT LAW

15. Rule 76(1) of the 2013 Rules provides that a Tribunal shall consider making a costs order against a paying party where, in the opinion of the Tribunal, the paying party has in bringing or conducting the proceedings, acted vexatiously, abusively, disruptively or otherwise unreasonably, or the claim or response had no reasonable prospect of success.
16. Rule 76(2) provides that a Tribunal may make a costs order against a party who has not complied with an order or practice direction.
17. Rule 78 sets out the provisions in respect of the amount of a costs order that may be made. There is a limit on the specific sum of £20,000. Alternatively, the parties may agree on a sum to be paid by the paying party or the Tribunal may order the whole or a specified part of the costs be determined by way of detailed assessment, either by the county court or an Employment Judge.
18. Rule 84 provides that the Tribunal may have regard to the paying party's ability to pay when considering whether it shall make a costs order or how much that order should be.

#### CONCLUSIONS

19. I concluded, in view of the history of the matter, that there was clear evidence that the Claimant had acted unreasonably in failing to comply with the order to prepare and exchange witness statements on the date set out in the case management order. I concluded that it was apparent to the Claimant that the

hearing could not proceed without witness statements; the case management order refers to the written statements being a requirement for each witness.

20. In addition, the Claimant had no reason for failing to comply, such as illness or other emergency. He simply refused to comply, and instead relied upon his appeals to the EAT, despite the fact that his request for a stay of proceedings in the Tribunal had been refused. It was a blatant failure to comply, and I concluded that it was unreasonable.
21. Having decided that there were grounds for making a costs order, I had to decide whether to exercise the discretion to make such an order. I began by noting that despite an increase in the size and frequency of costs awards, costs orders remain relatively rare in the Tribunal system. I noted that costs are compensatory by nature, not punitive. I considered that the Claimant, a litigant in person, should be judged less harshly than a litigant who had been professionally represented.
22. I concluded that the unreasonable conduct by the Claimant did not relate to paying the deposit, or bringing the claim in the first place, both of which could arise when a lay person lacked objectivity and knowledge of law and practice (although the Claimant had told me that he was familiar with the relevant law). The unreasonable conduct was the deliberate failure to comply with a straightforward order to exchange witness statements, even when the order was emphasised in an Unless Order. That was a serious failure, and one which caused the Respondent to incur costs in preparing their own case which were in effect wasted when the claim was struck out and the hearing had to be vacated.
23. I concluded that this was a case where it would be appropriate to exercise the discretion and make a costs order.
24. Turning to the Respondent's costs schedule, I considered that the costs of preparing the bundle would have been incurred in any event, and should not form part of the calculation. I considered that the Claimant's appeals to the EAT could not be described as unreasonable conduct; he was entitled to do so. Where he lapsed into unreasonable conduct was when he stopped preparing for the Tribunal hearing in tandem with his appeals, knowing that his request for a stay had been refused. The Respondent was obliged to continue to comply with the Tribunal orders, and prepare for the hearing notwithstanding the Claimant's conduct, and I concluded that that was the area where costs were incurred because of the Claimant's unreasonable conduct.
25. I decided that the costs for the preparation of witness statements (£5,441 plus VAT) and Counsel's brief fee (£1,005 plus VAT) were the proportionate and reasonable amounts to award; those costs were reasonably and necessarily incurred by reference to the Claimant's unreasonable conduct.

26. Accordingly, I ordered the Claimant to pay the Respondent a contribution towards their costs of £6,446 plus VAT.

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Employment Judge Wallis  
9 May 2017