EMPLOYMENT TRIBUNALS

Claimant: **Ms. S Coupe**

Respondent: **The Yews Residential Home Limited**

Heard at: **Nottingham**

On: **5th April 2017 (In Chambers and on the papers)**

Before: **Employment Judge Heap (Sitting Alone)**

Representation:

Claimant: **Written Representations**
Respondent: **Written Representations**

JUDGMENT ON COSTS

The Respondent's application for costs is refused.

REASONS

BACKGROUND & THE ISSUES

1. This Judgment arises from an application made by The Yews Residential Home Limited (hereinafter "The Respondent") seeking an Order for costs against Ms. S Coupe (hereinafter "The Claimant").

2. The application follows the dismissal on withdrawal of the Claimant's claim of unauthorised deductions from wages which she had brought against the Respondent by way of a Claim Form dated 3rd June 2016.

THE HEARING

3. The hearing of this application has proceeded on the papers and without an oral hearing. Both parties were given the opportunity to make any representations as to why an oral hearing might be required but both were in agreement that the matters should proceed on the papers. In all events, my view is that that is an appropriate way to proceed in respect of this application given the amount of the costs Order sought and in view of the overriding objective. Both parties have had the opportunity to make

written representations in respect of the application and I have taken all of those into account before making my determination.

RELEVANT BACKGROUND TO THE CLAIM AND THE APPLICATION

4. The Claimant presented a claim to the Tribunal on 3rd June 2016 complaining that the Respondent had not paid her wages to which she was entitled. Her complaint therefore was one of a breach of the provisions of Section 13 Employment Rights Act 1996. The Claimant paid the required fee to present the claim.

5. The ET1 Claim Form submitted by the Claimant required her to set out the name and address of the Respondent to the proceedings in order that the Claim Form could be served upon them. At section 2 of the ET1 Claim Form the Claimant gave the following details in this regard:

   The Yews Residential Home Limited
   2 Church Street
   Derby
   Derbyshire
   DE23 0PR.

6. The claim was duly served upon the Respondent at that address on 7th June 2016 and that correspondence notified the parties that any ET3 Response must be presented by no later than 5th July 2016. A hearing date was also set for 5th August 2016.

7. On 12th July 2016 the claim was referred to an Employment Judge on the basis that the Respondent had not entered an ET3 Response and consideration therefore needed to be given to whether a Default Judgment should be issued under Rule 21 Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013.

8. Regional Employment Judge Swann, in the absence of that ET3 Response, issued a Default Judgment in favour of the Claimant Ordering the Respondent to pay to her the sum of £682.50. The hearing was at the same time cancelled.

9. That Default Judgment was sent to the parties on 12th July 2016. The address to which it was sent to the Respondent was the same as that which the Claimant had set out in her Claim Form and which had been used to serve the claim in the first instance.

10. That correspondence was returned to the Tribunal in early August 2016 by Royal Mail as apparently undeliverable.

11. On 2nd September 2016 a call was received from a representative of the Respondent indicating that they had not received any paperwork in respect of the claim and that they had only discovered that a Judgment had been entered as a result of contact from a third party seeking to enforce the same.

12. That was followed by an email from the Respondent dated 13th September 2016. The Respondent set out that they had not received any

documentation relating to the claim and the address to which the same should have been sent was as follows:

The Yews Residential Home Limited
2 Church Street
Alvaston
Derbyshire
DE24 0PR.

13. That email was treated as an application for Reconsideration of the Default Judgment and the Respondent was accordingly informed that before the application could be considered, a fee of £100.00 was payable. The Respondent duly paid that fee and reiterated that the reason that they had not entered any Response to the claim was that they had not been aware of it because the Tribunal had the incorrect address.

14. After considering representations both from the Respondent and the Claimant, Employment Judge Britton set aside the Default Judgment by way of a Judgment sent to the parties on 1st November 2016.

15. The Claim Form was then re-served upon the Respondent and they entered an ET3 Response under cover of a letter of 9th November 2016. The claim was resisted.

16. On 16th November 2016 the Claimant was sent a Notice to pay the hearing fee of £230.00 as by that stage, the hearing had been relisted.

17. On 23rd November 2016 the Claimant wrote to the Tribunal withdrawing her claim. Her email in which that withdrawal was made said this:

"Due to being diagnosed with stress and anxiety problems which has made me unable to work, Financially I cannot afford to pursue this case any further.
This is with the deepest regret".

18. It was followed by a further email 16 minutes later indicating that due to health problems the Claimant wished to withdraw the claim.

19. In view of that withdrawal, on 23rd November 2016 the Respondent made their application for costs.

20. On 24th November 2016 a Judgment was issued by Employment Judge Britton dismissing the claim on withdrawal.

THE COSTS APPLICATION

21. I shall set out here in summary form only the respective positions of the parties with regard to the costs application.

THE RESPONDENT'S POSITION

22. The Respondent contends that it is unfair that they should have been put to the expense of paying the £100.00 fee (although in the costs application this is wrongly said to have been £140.00) through the Claimant's error in

setting out the correct address for the Company in her ET1 Claim Form. The Respondent contends that the Claimant had been negligent in setting out the incorrect address and that it should not have to bear the financial repercussions of that error.

THE CLAIMANTS POSITION

23. The Claimant's position has been set out in correspondence. She resists the costs application on the following grounds:

    (i) That she had been forced to withdraw her claim as a result of health and financial issues and that as she had not been paid her due wages it was unfair to grant the application; and

    (ii) That it had been a simple error with regard to the postcode that had caused the Respondent not to receive the claim.

24. I have considered all that both parties have had to say before reaching my conclusions below.

THE LAW

25. Before turning to my conclusions with regard to the application, I deal here with consideration of the law which I am required to apply.

26. Rules 74 to 84 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("The Regulations") deal with the question of when an Employment Tribunal may make an Order for costs.

27. Rule 75 provides as follows:

"Costs orders and preparation time orders

75.*—(1) A costs order is an order that a party ("the paying party") make a payment to—*

(a)another party ("the receiving party") in respect of the costs that the receiving party has incurred while legally represented or while represented by a lay representative;

(b)the receiving party in respect of a Tribunal fee paid by the receiving party; or

(c)another party or a witness in respect of expenses incurred, or to be incurred, for the purpose of, or in connection with, an individual's attendance as a witness at the Tribunal.

(2) A preparation time order is an order that a party ("the paying party") make a payment to another party ("the receiving party") in respect of the receiving party's preparation time while not legally represented. "Preparation time" means time spent by the receiving party (including by

any employees or advisers) in working on the case, except for time spent at any final hearing.

(3) A costs order under paragraph (1)(a) and a preparation time order may not both be made in favour of the same party in the same proceedings. A Tribunal may, if it wishes, decide in the course of the proceedings that a party is entitled to one order or the other but defer until a later stage in the proceedings deciding which kind of order to make. "

28. Rule 76 sets out the relevant circumstances in which an Employment Judge or Tribunal can exercise their discretion to make an Order for costs, the relevant portions of which 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.

(2) A Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party.

29. In short, therefore, there is discretion to make an Order for costs where a party or their representative 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".

30. 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 ……. 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)**

31. It should be noted that merely because a party has been found to have acted vexatiously, abusively, disruptively or unreasonably, 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. Particularly, when deciding whether an Order

should be made at all and, if so, in what terms, a Tribunal is required to take any relevant mitigating factors into account.

32. In addition to the provisions of Rules 76(1) and (2), since the introduction of Tribunal fees the Regulations include provision for the Tribunal to Order that fees paid (be that issue fee, hearing fee or any other relevant fee) are paid by the other party. This is provided for by Regulation 76(4) which provides as follows:

(4) A Tribunal may make a costs order of the kind described in rule 75(1)(b) where a party has paid a Tribunal fee in respect of a claim, employer's contract claim or application and that claim, counterclaim or application is decided in whole, or in part, in favour of that party.

33. An Order for the payment of fees in that regard does not require the paying party to have acted in a way described within Regulations 76(1) or (2) and the provisions are quite distinct. The ability to make a costs order in those circumstances is engaged where the claim is in whole or in part resolved in favour of the party making the application.

34. 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.

CONCLUSIONS

35. I am satisfied that there can be no question that the Claimant's failure to put the precise address of the Respondent – in respect of which there was essentially an error of one letter in the postcode – can be said to be conduct falling within Rule 76(1) of the Regulations. The Claimant made a simple error. She was at all material times acting as a litigant in person and what she quite rightly describes as an incident of human error cannot be categorised as unreasonable conduct or any other such conduct so as to bring the situation within Rule 76(1).

36. It should be noted that there is no contention made by the Respondent that the Claimant's withdrawal of the claim was such as to amount to conduct falling within Rule 76(1). Had that argument been raised, however, then I would have dismissed it on the basis that it is clear that the Claimant's withdrawal came shortly after the Notice to pay the hearing fee was issued and there is no suggestion that that did not result from ill health and financial issues. The Claimant did not leave matters until the eleventh hour but acted promptly. Her conduct as such was not unreasonable or in any form otherwise such as to bring her within the ambit of Rule 76(1).

37. However, I must also consider the question of whether I should make an Order in the terms provided for by Rule 76(4) of the Regulations, which does not require me to make any adverse finding as to the Claimant's conduct of these proceedings.

38. I am satisfied that Rule 76(4) is on the face of it engaged in these circumstances given that the Respondent has paid a Tribunal fee in respect of an application in the proceedings and that application was decided in favour of the Respondent.

39. However, the terms of Rule 76(4) by reference to the word "may" make it clear that this is a discretionary Order. I am not therefore automatically bound to make an Order simply because the Respondent succeeded in their application.

40. This is an unusual situation and it is, in my view, quite distinct to more "normal" cases where Orders are made that issue and hearing fees should be paid to the successful party in respect of a claim or counterclaim. In those cases, clearly where the party has been justified in bringing a claim or counterclaim and the Tribunal has found it their favour it will generally be just to Order that the fees that they had to pay to bring the complaint and recover what is due to them be paid.

41. However, this situation is not the same. Here, the fee came about as a result of a simple error on the Claim Form which led to the Respondent not being served at the correct address. The fee did not arise as a result of a disputed issue or complaint as between the Claimant and Respondent which was resolved in favour of the Respondent and therefore in which the Respondent had been found to have been "right". The payment of the fee arose only from the Claimant's error on the Claim Form and thus the inability of Royal Mail to deliver the Claim Form.

42. Whilst I accept that it is unpalatable to the Respondent that they should have to pay that fee, I do not consider in the circumstances that it is just and equitable to Order the Claimant to pay the same given that it was a matter of human error and not an argument advanced by the Claimant that was dismissed by the Tribunal which led to the fee having to be paid.

43. As such, I do not consider it appropriate to exercise my discretion to Order the Claimant to pay to the fee incurred by the Respondent in these circumstances.

Employment Judge Heap

Date_**5th April 2017**
JUDGMENT SENT TO THE PARTIES ON

11 April 2017

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FOR THE TRIBUNAL OFFICE