EMPLOYMENT TRIBUNALS

Claimant: Dr S Kumar

Respondent: The Care Quality Commission

Heard at: Manchester

Before: Employment Judge Ainscough

JUDGMENT

The respondent's application for wasted costs is refused.

REASONS

Introduction

1. Following a case management hearing on 24 January 2020, the respondent made an application for wasted costs in accordance with rule 82 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. I agreed to deal with the application without a hearing.

The Proceedings

2. The claimant started early conciliation on 22 May 2019 and was issued with the certificate on 21 June 2019. On 16 July 2019 the claimant submitted an ET1 and detailed grounds of claim prepared by his solicitor which specified each of the protected disclosures and the detriments that arose from those protected disclosures, for the purposes of his claim under section 47B of the Employment Rights Act 1996.

3. On 28 August 2019 the respondent's representative submitted an ET3 and detailed grounds of resistance on the respondent's behalf.

4. The parties appeared before Employment Judge Ross on 16 October 2019 and a Case Management Order was produced. The claimant was ordered to produce a table setting out details of the disclosures and why they qualified as protected disclosures under the Employment Rights Act 1996 and details of each detriment and provide that document to the Tribunal and the respondent by 30 November 2019. The same Order then gave the respondent an opportunity to amend the response by 11 December 2019.

5. Employment Judge Ross had the foresight to list a preliminary hearing on 24 January 2020 to determine whether there had been an amendment to the claimant's claim once the table had been produced.

6. The claimant provided the table to the respondent and the Tribunal on 13 November 2019. On 11 December 2019 the respondent amended the response and contended that the table went further than the original grounds of complaint.

7. Subsequently, on 20 December 2019 the claimant's representative made an application to amend the grounds of claim. In making that application the claimant's representative explained that the claimant now wished to rely on further qualifying disclosures and given that the respondent had accepted some as protected disclosures, it was the view of the claimant's representative that the respondent would not be prejudiced by this application.

8. The claimant's application to amend was advanced by counsel at the preliminary hearing on 24 January 2020. It was contended that the claimant sought to rely on four additional qualifying disclosures but no additional detriments, and it was agreed between the parties that the claimant was not seeking to bring any new claims.

9. The respondent opposed the application on the grounds that a witness would have to provide additional evidence about the new disclosures at the final hearing. The respondent considered this to be a prejudice and one that should override the claimant's right to amend his claim.

10. The claimant's application to amend the claim was allowed on the basis that whilst he was seeking to rely on additional disclosures, the witness would be in attendance at the final hearing in any event, and could be asked to provide additional evidence on the additional disclosures. I was satisfied that the final hearing listed for five days could accommodate this additional evidence. I determined that the claimant would suffer a greater hardship should the application be denied than any prejudice caused to the respondent's witness in having to give additional evidence.

11. At the end of the hearing, the respondent's representative reserved the right to make an application for wasted costs on the grounds that the claimant's solicitor had only provided the Tribunal with an explanation for the claimant's failure to include these additional disclosures within the original grounds of claim, after business hours the night before the preliminary hearing. It was the respondent's initial view that had the claimant's representative provided that explanation prior to the preliminary hearing, the preliminary hearing might not have been necessary.

Respondent's Application

12. On 7 February 2020 the respondent's representative made an application for wasted costs in accordance with rule 82 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. The application was made on the basis that the claimant's representative had failed to:

(a) provide a timely explanation for the application to amend; and

(b) provide an adequate application for the application to amend.

13. The respondent's representative relies on comments made by counsel for the claimant when making the application to amend, that it was "not brilliant", and he did not have instructions as to the delay in making the application and that the explanation of the need for the application only came after he alerted his solicitors of the need for it to be made.

14. The respondent's representative also relies on the comments made by me at the case management hearing that the explanation given by the claimant's representative was "poor", it had only come at counsel's behest and that the claimant's solicitors were putting his claim at risk by their approach. It is the respondent's submission that had the claimant's representative engaged with the **Selkent Bus Co Ltd v Moore 1996 ICR 836** criteria prior to the hearing, when the application was made on 20 December 2019, the respondent would have been able to investigate the matter and "matters would have unfolded in a different fashion".

15. Finally, the respondent reminded me of the threefold test in the case of **Ridehalgh v Horsefield [1994] CH205**, and submits that the claimant's representative was unreasonable in the way she has conducted the application. It is the respondent's case that this unreasonable conduct has caused wasted costs because it was necessary to attend the preliminary hearing to properly understand the application. Further, it is the respondent's position that it would be just to order costs because the claimant's representative should be capable of making such a straightforward application. The respondent submits that the cost of defending the amendment application is £2,103.

Claimant's Response

16. On 28 February 2020 the claimant's representative objected to the respondent's application for wasted costs. The claimant's representative submits that the additional disclosures are important and the amendment was permitted. It is contended that had the respondent accepted this position prior to the preliminary hearing, the hearing would not have been necessary.

17. The claimant's representative submits that the respondent has failed to include crucial correspondence between the parties in their application for wasted costs. The claimant's representative submits that even if the explanation for the failure to include the additional disclosures had been given prior to the preliminary hearing the respondent would have requested the preliminary hearing in any event.

18. The claimant's representative contends that within the response the respondent required further information from the claimant. When providing that further information to the respondent on 15 October 2019, the claimant produced a list of protected disclosures which included two new disclosures.

19. It is submitted that the claimant received a response to a subject access request and provided the claimant's representative with those documents on 3 November 2019. Further additional disclosures were then identified. All new disclosures were included in the table produced and sent to the Tribunal and the respondent on 13 November 2019.

20. The claimant's representative submits that in the amended response of 11 December 2019, the respondent in fact conceded one of the new disclosures was a qualifying disclosure.

21. The claimant's representative states that the respondent has not provided the Tribunal with detail of the email the respondent's representative sent to the claimant's representative on 11 December 2019 in which the respondent's representative states that should the claimant continue with the claim on the basis of the concessions made by the respondent as to qualifying disclosures, he would not be required to amend his claim. This message was confirmed in a response to a request from the claimant's representative to clarify exactly what was being said.

22. The claimant's representative submits that despite this concession, the respondent continued to object to all of the additional disclosures being included in the claim. The claimant's representative submits that had an explanation for the need to amend been given on 11 December 2019 this would not have prevented the need for a preliminary hearing because the respondent had already taken the position that it would not agree to all disclosures being included within the claim because of the need for the witness to give further evidence.

Relevant Legal Principles

23. Rule 80 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 provides the Tribunal with the power to make a wasted costs order:

> **80**
>
> **(1) A Tribunal may make a wasted costs order against a representative in favour of any party ("the receiving party") where that party has incurred costs—**
>
> **(a) as a result of any improper, unreasonable or negligent act or omission on the part of the representative; or**
>
> **(b) which, in the light of any such act or omission occurring after they were incurred, the Tribunal considers it unreasonable to expect the receiving party to pay.**
>
> **Costs so incurred are described as "wasted costs".**

24. Rule 82 sets out the procedure for applying for a wasted costs order:

82

> **"A wasted costs order may be made by the Tribunal on its own initiative or on the application of any party. A party may apply for a wasted costs order at any stage up to 28 days after the date on which the judgment finally determining the proceedings as against that party was sent to the parties. No such order shall be made unless the representative has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application or proposal. The Tribunal shall inform the representative's client in writing of any proceedings under this rule and of any order made against the representative."**

25. The leading guidance on dealing with such an application was provided by the Court of Appeal in the case of **Ridehalgh v Horsefield [1994] CH205**, and the following three stage test should be applied:

(1) Has the legal representative of whom complaint was made acted improperly, unreasonably or negligently?

(2) If so, did such conduct cause the applicant to incur unnecessary cost?

(3) If so, is it, in all the circumstances, just to award the legal representative to compensate the applicant for the whole or part of the relevant cost?

26. In the case of **KL Law Ltd v Wincanton Group Ltd and anor EAT 0043/18** the President of the EAT remarked that:

> **"A wasted costs order is an order that should be made only after careful consideration and any decision to proceed to determine whether costs should be awarded on this basis should be dealt with very carefully. A wasted costs order is a serious sanction for a legal professional. Findings of negligent conduct are serious findings to make. Furthermore, even a modest costs order can represent a significant financial obligation for a small firm. Tribunals should proceed with care in this area."**

Discussion and conclusions

(1) Has the legal representative of whom complaint was made acted improperly, unreasonably or negligently?

27. The respondent submits that the last-minute explanation provided by the claimant's representative for the need to amend the claim, and the explanation itself, was unreasonable conduct.

28. Unreasonable behaviour has been described in **Ridehalgh v Horsefield [1994] CH205** as vexatious or designed to harass the other side rather than advance the resolution of the case; it is behaviour that cannot reasonably be explained.

29. The claimant's representative made the application to amend on 20 December 2019. The application went no further than to say that the claimant wished to rely on further qualifying disclosures. It did not explain why those disclosures were not included in the original claim form. That explanation only

came via email from the claimant's representative at 17.33 on 23 January 2020.

30. Counsel for the claimant struggled to explain why the explanation had only been provided the night before the hearing. I took a dim view of the timing of the explanation and the explanation itself.

31. There was no attempt by the claimant's representative to set out why the application made on 20 December 2019 did not include an explanation for the claimant's failure to include the additional disclosures in his claim form. It is clear that until Counsel was instructed, the claimant's representative had not intended on providing any such explanation. The lack of explanation until the night before the preliminary hearing is behaviour that cannot be reasonably explained and was unreasonable.

32. It was submitted on the claimant's behalf that the additional disclosures were not included in the claim form because he had not appreciated the significance of the disclosures until in receipt of the original response and documents disclosed as part of a subject access request. I did not hear from the claimant by way of witness evidence, nor was I shown any documentary evidence to support this rationale.

33. The failure to provide such evidence in support of the application also amounts to behaviour that cannot reasonably be explained, and there was in fact no attempt to explain the lack of such evidence to assist with the amendment application. This also amounts to unreasonable behaviour.

(2) <u>If so, did such conduct cause the applicant to incur unnecessary cost?</u>

34. The respondent was able to respond to the additional disclosures before the deadline for the amended response and was aided in doing so by the submission of the further and better particulars a month before the amended response was due.

35. I am now aware that there was email correspondence between the claimant's representative and the respondent's representative on 11 December 2019. This correspondence followed the respondent's amended response in which the respondent admits some disclosures were qualifying disclosures.

36. It appears that the respondent would have been content to agree to part of the amendment. The claimant's representative was unable to agree that the remaining additional disclosures were not qualifying disclosures and asked the respondent's representative whether the respondent still required an application to amend. The respondent's representative required the application to be made.

37. The respondent made no such concessions during the hearing of 24 January 2020 but instead, opposed the whole application on the basis that a witness would have to give more evidence and that there was a real risk that the hearing would go part heard.

38. The respondent contends that had the claimant's representative provided an explanation of the need to amend on 20 December 2019 and further provided supporting evidence, "matters would have unfolded in a different fashion". I don't agree.

39. Even if the 20 December 2019 application had included the explanation and supporting evidence, it would not have included a concession from the claimant that he was no longer relying on all the disclosures. From the email correspondence I have seen, this was the deciding factor for the respondent to require the application to be made.

40. In addition, the respondent opposed the whole of the application on the basis of additional witness evidence and prejudice that would be caused to the respondent. It is unlikely that the respondent's position on this point would have been remedied by an earlier explanation with supporting evidence.

41. The stance taken by the respondent in the email correspondence and at the hearing meant that a preliminary hearing was inevitable and wasted costs have not been incurred.

42. I therefore, do not need to deal with the question of whether it would be just in all the circumstances to make a wasted costs order. The application for wasted costs is rejected.

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Employment Judge Ainscough

Date: 1 June 2020

REASONS SENT TO THE PARTIES ON

3 June 2020

FOR THE TRIBUNAL OFFICE