# EMPLOYMENT TRIBUNALS

**Claimant:** **Mr D Sullivan**

**Respondent:** **Foundry Engineering and Technical Limited**

**Heard at:** **Cardiff via CVP** **On: 10 September 2021**

**Before:** **Employment Judge S Jenkins**

**Representation:**
Claimant: Mr P Morris (Counsel)
Respondent: Mr S Proffitt (Counsel)

# RESERVED JUDGMENT ON COSTS

The Respondent's applications for a costs order and a wasted costs order are refused.

# REASONS

**Background**

1. The Claimant resigned from his employment with the Respondent on 30 April 2020, in circumstances which he contended amounted to constructive unfair and wrongful dismissal. He contacted ACAS for the purposes of early conciliation on 8 July 2020, and the Early Conciliation Certificate was issued on 23 July 2020. That meant that the time for submission of the claim form was extended to 23 August 2020.

2. In fact, the Claimant purported to submit his claim form soon after the end of the early conciliation period, as his solicitors, McTaggart Solicitors, submitted the claim form by email to the Wales Employment Tribunal on 28 July 2020. The automated reply from the Tribunal noted that claims cannot be accepted by email, but that did not appear to have been noted by the solicitors.

3. Subsequently, on 19 August 2020, a letter was sent from the Tribunal to the solicitors by email, noting that the claim form was being returned because there were only three prescribed methods of presenting a claim form; online, by post to the Employment Tribunal Central Office in Leicester, or by hand to a designated Employment Tribunal office. The letter concluded by saying that as the claim form had not been presented using one of the prescribed methods it could not be accepted and was returned.

4. In light of that letter, someone from the solicitors attended at the Tribunal office in Cardiff, which is a designated Employment Tribunal Office, on the same day, 19 August 2020, and delivered a letter, in which it was noted that they had routinely filed claim forms by email in the past and were unaware of any change. I observe however, that the prescribed methods had been in place for many years. The letter concluded by asking that, if it was necessary, the Tribunal should accept the letter as the Claimant's application to file his claim form out of time. That was a rather confusing application, as time for submission of the claim form had not yet elapsed.

5. At the same time, and although there was no evidence within the bundle of any covering letter, it appeared that the representative from the solicitors also hand delivered a copy of the claim form on that day, and a signed receipt was provided by a member of the Tribunal's administrative staff. That delivery by hand on 19 August 2020 was, with hindsight, a valid and effective delivery of the claim form within the stipulated time period. However, no action appears to have been taken by the Tribunal staff to register the claim at that time.

6. Instead, whilst there is no indication as to how and why this was done, it appears that an online submission was made of the claim form on 4 November 2020, and a letter was sent to the Claimant on that date from the Employment Tribunal Central Office in Leicester noting the receipt of the claim on that day and stating that it had been forwarded to the Cardiff office. It was that claim which was then processed by the Wales Tribunal's administrative staff.

7. The claim was acknowledged on 15 November 2020 and was served on the Respondent on that day, with the case being given an automatic one-day listing with a hearing date of 3 March 2021. The Respondent served its Response on 11 December 2020 in which it defended the claim on substantive grounds but also noted, in one paragraph out of forty, that the Claimant's claim may have been submitted out of time.

8. Subsequent to that, the Respondent's representative wrote to the Tribunal on 18 December 2020, indicating that it was felt that one day would be insufficient to complete the hearing, and making an application therefore to

postpone the scheduled hearing and for the case to be relisted for two days. The Claimant's representative wrote in, on 28 December 2020, agreeing with that proposal.

9. In the meantime, the case was referred, coincidentally to me, under Rule 26 of the Employment Tribunals Rules of Procedure which provides that, as soon as possible after the acceptance of a Response, an Employment Judge shall consider all of the documents held by the Tribunal in relation to the claim to confirm whether there are arguable complaints and defences within the jurisdiction of the Tribunal.

10. From the Tribunal file, it appeared to me that the claim had been submitted on 4 November 2020; as a consequence, that it had been submitted out of time; and therefore I directed that a Notice and Order, pursuant to Rule 27(1) be sent to the parties. That Notice, sent to the parties on 1 February 2021, indicated that, having considered the file, I was of the view that the Tribunal had no jurisdiction to consider the claim as it appeared to have been submitted outside the specified time limit. The Order concluded by saying that the claim would stand dismissed on 15 February 2021, without further order, unless, before that date, the Claimant had explained in writing why the claim should not be dismissed.

11. The Claimant's solicitors then wrote promptly, the following day, 2 February 2021. Again, this letter was somewhat confusing, in that it referred to an application to file the claim form out of time having been made on 19 August 2020, at a time when it was still in time, but also referring to the claim form having been hand delivered to the Tribunal on that date. The letter also then displayed the Claimant's solicitors' ignorance of the Rule 26 and 27 procedure.

12. That letter was then considered by Employment Judge Brace, who directed that the hearing on 3 March 2021, which was still in the Tribunal's list at that stage, be converted to a preliminary hearing to consider whether the claims had been submitted outside the stipulated time limit or whether, because of those time limits (and not for any other reason), the claims should be struck out on the basis that they had no reasonable prospect of success or had little reasonable prospect of success. Judge Brace also directed that the parties should disclose relevant evidence in relation to the preliminary hearing and agree a hearing bundle. That Notice of Hearing and those directions were sent to the parties on 19 February 2021.

13. Then, on 24 February 2021, the Claimant's solicitors wrote to the Tribunal. Again, that was a somewhat confusing letter, as it stated, "*We have explained to the client that the Employment Tribunal has, of its own volition under Rule 37 and Rule 39 and in particular the prospect of a deposit order, the Claimant has resolved to withdraw his claim*". Whilst the sentence

lacked complete sense, the decision to withdraw the claim was clear, and a Judgment dismissing the claims on withdrawal was sent to the parties on 12 March 2021.

14. Following the withdrawal, a costs application was submitted by the Respondent on 2 March 2021, at a time when it was not represented. The parties were then asked to confirm whether they wished the application to be decided at a hearing., and the Respondent replied requesting that the matter be decided at a hearing. The Claimant's solicitor, whilst not addressing the particular point about a hearing, sent in a letter, dated 25 March 2021, together with several appendices, in which it set out the Claimant's resistance to the costs application.

15. A telephone preliminary hearing for case management purposes was then scheduled for 16 April 2021, and took place before Employment Judge Havard. He summarised that the Respondent was making an application for a costs order against the Claimant and for a wasted costs order against the Claimant's representative, McTaggart Solicitors. Judge Havard recorded that the Respondent was pursuing a claim for legal costs in the sum of £12,400. He also recorded that the Respondent was pursuing other sums relating to compensation and emotional stress and the return of company property, which Mr Proffitt, in this hearing, confirmed were understood and accepted by the Respondent as not being able to be ordered by the Tribunal. This hearing was then scheduled before me.

**<u>Law</u>**

16. Rule 76 of the Employment Tribunals Rules of Procedure provides as follows:

 "*(1) A Tribunal may make a costs order…, and shall consider whether to do so, where it considers that-*

 *(a) a party…has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of proceedings (or part) or the way that the proceedings (or part) have been conducted; or*

 *(b) any claim or part had no reasonable prospect of success.*"

17. Rule 77 provides that a party "*may apply for a costs order…at any stage up to 28 days after the date on which the judgment finally determining the proceedings in respect of that party was sent to the parties. No such order may be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application*".

18. Rule 78 then contains provisions dealing with the amount of a costs order, and Rule 84 notes that a Tribunal may have regard to the paying party's ability to pay.

19. I was conscious that the Employment Appeal Tribunal ("EAT"), in Hossaini v EDS Recruitment Ltd [2020] ICR 491, confirmed that assessing whether to make a cost order involves a three-stage test: (i) Whether Rule 76(1) is engaged; (ii) If so, whether to award costs in the circumstances, that being at the discretion of the Tribunal; (iii) If so, how much to award.

20. The costs application was made under Rule 76(1)(a), i.e. that the Claimant, "*acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of proceedings (or part) or the way that the proceedings (or part) have been conducted*".

21. With regard to vexatious conduct, I noted the long established guidance set out in the case of ET Marler Ltd v Robertson [1974] ICR 72, that a claimant acts vexatiously if they bring a hopeless claim, not with any expectation of recovering compensation, but out of spite to harass their employer or for some other improper motive. I also noted the direction of the Court of Appeal in Scott v Russell [2013] EWCA Civ 1432, which approved the definition of "vexatious", given by Lord Bingham in Attorney General v Barker [2000] 1 FLR 759, that "*the hallmark of a vexatious proceeding is… that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceedings may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the Claimant, and that it involves an abuse of the process of the court, meaning by that the use of the court process for the purpose or in a way which is significantly different from the ordinary and proper use of the court process*".

22. Finally, with regard to unreasonable conduct, I noted the guidance of the Court of Appeal, in Yerrakalva v Barnsley Metropolitan Borough Council [2012] ICR 420, that the vital point in exercising the discretion to order costs is to look at the whole picture and to ask whether there has been any unreasonable conduct by the paying party in bringing, defending or conducting the case and, in doing so identify the conduct, what was unreasonable about it, and what effect it had.

23. With regard to wasted costs, Rule 80 provides that 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 light of any such act or omission occurring after they were incurred, the Tribunal considers it unreasonable to expect the receiving party to pay.*"

24. In Ridehalgh v Horsefield and other cases [1994] 3 All ER 848, the Court of Appeal set out a three-stage test for wasted costs:

    a. Has the legal representative acted improperly, unreasonably or negligently?

    b. If so, did such conduct cause the applicant to incur unnecessary costs?

    c. If so, is it just to order the legal representative to compensate the applicant?

25. Overall, although not directly applicable, I also bore in mind the approach suggested in the civil courts' Guide to the Summary Assessment of Costs, that costs awards should not be disproportionate or unreasonable.

**The Application**

26. As outlined in Mr Proffitt's skeleton argument, the basis of the application for costs under Rule 76(1)(a) was as follows:

    (1) That the claim had been brought out of spite and to harass the Respondent due to extraneous factors, including parallel litigation to which this claim was simply retaliation.

    (2) That the Claimant's conduct of proceedings, through his representative, was unreasonable, particularly by:

        a. a failure to engage and correspondence and the manner of the correspondence;

        b. failure to comply with Orders and to properly prosecute the case;

        c. the late withdrawal of the claim only after the Respondent had plainly incurred significant costs.

    (3) That having brought the claim, the Claimant's representative made a catalogue of deliberate or negligent steps which, on either basis, were to be categorised as unreasonable including:

        a. lodging the claim via an impermissible method;

b. failing to tell the Respondent about the real circumstances of the claim despite the ongoing correspondence;

c. failing to comply with Orders and showing contempt when asked to do so;

d. ultimately withdrawing the claim shortly before a preliminary hearing but only following the asserted catalogue of errors and poor conduct, on the alleged basis that the Claimant anticipated that the claim would be struck out or be subject to a deposit order.

27. Mr Proffitt also contended that, as the Claimant had chosen to make no attempt to rebut the Respondent's assertions, whether by way of documentary or witness evidence, that was further evidence of the Claimant's unreasonable and vexatious conduct. He submitted that, in any event, even if evidence had been adduced to contend that the Claimant did not have an intent to act vexatiously it was plain that the conduct had that effect within the ambit of ***Scott -v- Russell*** and ***AG -v- Barker***.

28. With regard to wasted costs, the Respondent's application was based on what was contended to have been conduct by the Claimant's representative which was deliberately obtuse at best, or negligent at worst, and which led the Respondent and the Tribunal down a "garden path" of wasted time and costs.

29. In response on behalf of the Claimant and McTaggart Solicitors, Mr Morris noted, with regard to the contention that no attempt had been made to rebut the Claimant's assertions, that the letter from the Claimant's solicitors of 25 March 2021 set out the Claimant's position with regard to the matters being advanced. Mr Morris contended that the conduct of the Claimant and his representative did not cross the line to become vexatious or unreasonable, noting, in particular, that the Claimant's email in which he informed the Respondent of his resignation stated that he had sought legal advice and that contact would be made. This he contended, demonstrated that the claim could not have been retaliatory in nature.

30. He noted the comment by Lord Bingham LCJ in ***AG -v- Barker*** that the hallmark of vexatious proceedings was that they have little or no basis in law, and contended that, in this case, there was a clear factual dispute which, if decided in the Claimant's favour, would have given a clear basis in law to his claims.

31. With regard to the question of reasonableness, Mr Morris noted that there had been minor errors, but observed that it would be easy to find minor errors in any case, and that it would be wrong to conclude that minor errors

should be identified as unreasonable conduct. He made similar points with regard to the wasted costs application.

32. Mr Morris contended that any errors that occurred would only have had a limited impact on the Respondent's costs in that it only caused the Respondent to make a limited reference to the potential that the claim was lodged out of time in its Response, and then to deal with some later correspondence on the point. He also contended that the decision to withdraw had been a commercial decision reached by the Claimant, as noted in his representative's letter of 25 March 2021, which referred to the Claimant taking the view that the costs involved in the preliminary hearing, followed by a further two-day hearing, would have been prohibitive.

## Conclusions

33. With regard to the contentions advanced by the Claimant, my conclusions were as follows

### Costs Application

34. With regard to the primary contention that the claim was brought as a vehicle to harass the Respondent and out of retaliation in relation to parallel litigation, I noted that the Claimant's resignation email of 30 April 2020 stated, "*I have sought legal advice and contact will be made in the coming days*". That contact was made, albeit only briefly, by McTaggart Solicitors on 7 May 2020. The next step was then a letter from the Respondent's solicitors on 14 May 2020 seeking the return of property and documents.

35. Thereafter, there was a chain of correspondence between the two firms of solicitors which regrettably, although perhaps not surprisingly in the context of threatened litigation, rather deteriorated, certainly once the Respondent's solicitors had threatened court action against the Claimant for breach of fiduciary and statutory duties, action which I understand has not, to date, been pursued.

36. Overall, bearing in mind the content of the Claimant's resignation email, I was not satisfied that the claim had been brought for a retaliatory motive or to harass the Respondent. The threat of legal action came from the Claimant first, and he clearly felt, at the outset, that he could have the basis of a claim arising from his resignation, i.e. of constructive unfair and/or wrongful dismissal. I saw nothing to suggest that that claim would not have been pursued regardless of the intimation by the Respondent that it would pursue its own legal action against him.

37. With regard to the conduct thereafter, there were delays in engaging with correspondence and, as was certainly the case in the communication from

McTaggart Solicitors to the Tribunal, the correspondence was, on occasions, confused. I did not however conclude that there was any unreasonable conduct in that.

38. Similarly with regard to the failure to comply with Orders, whilst there appear to have been delays in effecting disclosure, and it appears that the Claimant never provided a Schedule of Loss, I noted that that was in the context of an application having been made by the Respondent to postpone the hearing in March, and for the hearing to be re-listed. That would, had it been considered by the Tribunal, have been very likely to have been accepted and then to have led to a re-listing of the hearing some time later in 2021 and to a re-casting of the case management directions. I did not therefore consider that any delay in complying with Orders or any failure to comply with Orders, which had no material impact on the Respondent at the time, amounted to unreasonable conduct.

39. With regard to what was contended to be a late withdrawal of the claim, I concluded, in fact, that the withdrawal had been at a relatively early stage. Leaving the time point aside, the claim had been submitted and a response had been provided which, whilst providing a firm denial to the claim, did not give any indication that it was felt that it was being pursued vexatiously or out of malice in any way. The case had only then reached the stage of a preliminary hearing to consider the time point when it was withdrawn.

40. I noted that Mummery LJ, in ***McPherson -v- BNP Paribas (London Branch)*** **[2004] ICR 1398**, had observed that, "*it would be legally erroneous if, acting on a misconceived analogy with the CPR, tribunals took the line that it was unreasonable conduct for employment tribunal claimants to withdraw claims and that they should be made liable to pay all the costs of the proceedings*". Mummery LJ went on to say, "*It would be unfortunate if claimants were deterred from dropping claims by the prospect of an Order for costs on withdrawal, which might well not be made against them if they fought on to a full hearing and failed*". Taking that guidance into account, I did not consider that there had, in fact, been a late withdrawal of the claim, or that the withdrawal, regardless of its lateness or otherwise, amounted to unreasonable conduct.

41. With regard to the contended "catalogue of deliberate or negligent steps", which I considered should be categorised as negligent rather than deliberate, I noted, as was accepted by Mr Morris on behalf of the Claimant, and indeed on behalf of McTaggart Solicitors, that there had been errors, principally the initial error in seeking to submit the claim form to the Wales Employment Tribunal by email when that method was not permitted. However, that error was rectified by the hand delivery of the claim form to the Wales Employment Tribunal on 19 August 2020, even though the Claimant's representative did not appear fully to appreciate that. Whilst the

Claimant's solicitors did not provide a full explanation to the Respondent's solicitors of the steps taken with regard to the submission of the claim, I did not agree that the Claimant or his representative led the Respondent and the Tribunal down any "garden path" regarding what was referred to as an extension of time. Regardless of that however, I did not consider that that had any material impact on the overall costs incurred by the Respondent in defending the claim.

Wasted Costs

42. Applying the three-stage Ridehalgh test, I considered that the Claimant's representative did indeed act negligently when it first sought to submit the claim by way of email to the Wales Employment Tribunal. As I have noted however, that negligence was rectified by the hand delivery of the claim form to the Wales Employment Tribunal Office on 19 August 2020, which fell within the extended primary time limit.

43. I then considered whether the negligent conduct of the Claimant's representative had caused the Respondent to incur unnecessary costs and I did not consider that I could reach that conclusion.

44. Applying a basic "but for" analysis, had the claim form been submitted properly in July 2020 then the Respondent would not have had any concerns about the compliance with time limits, and nor would there have been any lack of clarity within the Tribunal about the point at which the claim had been lodged. However, as I have noted, the error was corrected within time, and it was the subsequent confusion that arose within the Tribunal, exacerbated by what appeared to have been a further submission of the claim online, which led to the confusion over the time limit issue.

45. I did not consider that I could say that the Claimant's negligent conduct, in the improper submission of the claim form initially, directly, or certainly exclusively, caused the Respondent to incur unnecessary costs. In any event, even if it had done so, I would not have considered that it would be just to order the Claimant's representative to compensate the Respondent as only minimal additional costs would have been incurred in any event.

46. Overall therefore I considered that the Respondent's applications for costs and wasted costs should be refused.

Employment Judge S Jenkins
Dated: 28 September 2021

JUDGMENT SENT TO THE PARTIES ON 29 September 2021

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS Mr N Roche