Case Number: 1300381/2017

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	AND	**Respondent**
Ms Mia Khan		The University of Warwick

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Birmingham **ON** 1 May 2018

EMPLOYMENT JUDGE Dimbylow

Representation
For the claimant: Not present or represented
For the respondent: Ms A Reindorf, Counsel

JUDGMENT

A JUDGMENT ON COSTS having been sent to the parties on 2 May 2018 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013 by both parties, the following reasons are provided:

REASONS

1. The claim. The history and background to this case is fully set out in various preambles to orders made or reasons given with judgements and therefore there is no need for me to recite it all here. Ms Reindorf helpfully summarised the background to the costs application in her written application for costs; I found it was fair, and I was prepared to accept it as an accurate account, with much of it being born out in the documents in the bundle prepared for this hearing.

2. The issue. The respondent applied for a costs order against the claimant and the purpose of this hearing was to determine that application only. The case was last before the tribunal on 26 March 2018 when the hearing was conducted by Employment Judge Broughton. He struck out the claimant's claims under rule 37

(1) (c) and (d). He directed that the respondent's application for costs should be put in writing and sent to the tribunal, and the respondent did that. The claimant was ordered to provide a detailed response and disclosure of her assets and income, but the claimant failed to do so. The costs hearing was fixed for today.

3.1 The law. This is to be found in the Employment Tribunal Rules of Procedure 2013, schedule 1, Rules 76 to 84, and I recite some of the main areas I considered:

When a costs order or a preparation time order may or shall be made

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(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.

(3) Where in proceedings for unfair dismissal a final hearing is postponed or adjourned, the Tribunal shall order the respondent to pay the costs incurred as a result of the postponement or adjournment if—

(a) the claimant has expressed a wish to be reinstated or re-engaged which has been communicated to the respondent not less than 7 days before the hearing; and

(b) the postponement or adjournment of that hearing has been caused by the respondent's failure, without a special reason, to adduce reasonable evidence as to the availability of the job from which the claimant was dismissed or of comparable or suitable employment.

(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.

(5) A Tribunal may make a costs order of the kind described in rule 75(1)(c) on the application of a party or the witness in question, or on its own initiative, where a witness has attended or has been ordered to attend to give oral evidence at a hearing.

The amount of a costs order

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(1) A costs order may—

(a) order the paying party to pay the receiving party a specified amount, not exceeding £20,000, in respect of the costs of the receiving party;

(b) order the paying party to pay the receiving party the whole or a specified part of the costs of the receiving party, with the amount to be paid being determined, in England and Wales, by way of detailed assessment carried out either by a county court in accordance with the Civil Procedure Rules 1998, or by an Employment Judge applying the same principles; or, in Scotland, by way of taxation carried out either by the auditor of court in accordance with the Act of Sederunt (Fees of Solicitors in the Sheriff Court)(Amendment and Further Provisions) 1993, or by an Employment Judge applying the same principles;

(c) order the paying party to pay the receiving party a specified amount as reimbursement of all or part of a Tribunal fee paid by the receiving party;

(d) order the paying party to pay another party or a witness, as appropriate, a specified amount in respect of necessary and reasonably incurred expenses (of the kind described in rule 75(1)(c)); or

(e) if the paying party and the receiving party agree as to the amount payable, be made in that amount.

(2) Where the costs order includes an amount in respect of fees charged by a lay representative, for the purposes of the calculation of the order, the hourly rate applicable for the fees of the lay representative shall be no higher than the rate under rule 79(2).

(3) For the avoidance of doubt, the amount of a costs order under sub-paragraphs (b) to (e) of paragraph (1) may exceed £20,000.

Ability to pay

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In deciding whether to make a costs, preparation time, or wasted costs order, and if so in what amount, the Tribunal may have regard to the paying party's (or, where a wasted costs order is made, the representative's) ability to pay.

As always, I had regard to Rule 2, which states:

Overriding objective

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The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—

(a) ensuring that the parties are on an equal footing;

(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;

(c) avoiding unnecessary formality and seeking flexibility in the proceedings;

(d) avoiding delay, so far as compatible with proper consideration of the issues; and

(e) saving expense.

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.

3.2 I make some general points about dealing with an application for costs. The fundamental principle in the Employment Tribunal is that costs are the exception rather than the rule and costs do not normally follow the event. If the tribunal has to consider an application for a costs order, then it has to undertake a two-stage process. Firstly, the tribunal must be satisfied that the claim has been conducted in a manner falling within rule 76 (1) (a) and/or (b) and/or the paying party has breached orders, rule 76 (2). If it is so satisfied, then at the second stage the tribunal has to consider whether to make the order and in doing so may proceed to make the order if it thinks it is appropriate. As part of the second stage, if it is appropriate then the tribunal must consider the amount, and if the amount is above £20,000 the tribunal may order a detailed assessment, either here in the tribunal or in the County Court. I can undertake my own summary assessment of costs in the Employment Tribunal up to £20,000 if I consider that this properly compensates a party for the costs incurred because of the culpable conduct in question.

3.3 The purpose of a "no costs" regime in the Employment Tribunal is regarded as providing a more level playing field between employers who may be prosperous and employees who are less likely to be so in comparison. For that balance to be observed it seems to be the case that, for example, false or unwinnable claims are discouraged. This would be particularly so in relation to false claims; and where there was no available remedy, the no costs regime here would fall into disrepute. In the case before me, the claimant advanced serious allegations of discrimination, wherein the amount of compensation potentially recoverable is unlimited and reputational issues arise. False or exaggerated claims should be considered carefully. I remind myself that the object of any costs order, if made, must always be compensatory and not punitive.

3.4 I know that I have a further discretion, as I may have regard to the paying party's ability to pay. This is the case even if the tribunal orders a detailed assessment. Guidance has been given from previous cases encouraging tribunals to give their reasons for any decision whether or not to take ability to

pay into account. I also have regard to the status of the claimant as a litigant in person.

3.5 When considering unreasonable conduct, I know that I do not have to dissect the case in detail and I am encouraged to look at the whole picture in the case and ask whether there has been unreasonable conduct by a party in bringing and conducting the case, and when doing this identify the conduct, stating what was unreasonable and what effects it had. This arises out of the case of Barnsley MBC v Yerrakalva [2011] EWCA Civ 1255.

3.6 When considering no reasonable prospect of success, I have to consider, amongst other things, the question of whether the claimant ought to have known that there was no supportive material for her case. There is some overlap with unreasonableness. I look at costs warnings that may have been given. The test I apply is an objective one and is not dependent on whether the claimant genuinely believed in the claim, this being taken from Vaughan v London Borough of Lewisham [2013] IRLR 713, EAT.

4. The evidence. I received oral evidence from Mr Neal Anthony Welland, on behalf of the respondent, and documents which I marked as exhibits as follows:

R1 respondent's bundle (357 pages)
R2 witness statement of Mr Welland
R3 respondent's application for costs dated 5 April 2018 drafted by Ms Reindorf (13 pages)

I received no written or oral evidence from the claimant in relation to her means. The claimant is in breach of the order made by Judge Broughton on 26 March 2018 by failing to disclose her assets and income by 23 April 2018. The only communication that the tribunal has received from the claimant was an email dated 23 April 2018, timed at 22:23. The email was difficult to understand, given the history of the litigation. Judge Broughton directed in a letter to the claimant dated 25 April 2018 that she was to provide copies of all letters, emails and evidence referenced in her email; and furthermore, she was also directed to comply with the other directions in his judgement of 26 March 2018. As Judge Broughton noted in the letter that he requested be sent to the claimant, it was unclear what, if any application the claimant was making. To help understand what she was saying, she was asked to confirm if it was her suggestion that the claim should not been struck out or was already withdrawn. She was asked reply by 1 May 2018. She acknowledged receipt of that letter; but has not provided a comprehensive response. Unfortunately, this short narrative reflects the way in which the claimant has dipped in and out of the proceedings at a whim, and routinely breached orders made by the tribunal.

5. The submissions. Ms Riendorf spoke to and relied upon her written application document; and therefore, there is no need for me to repeat everything

she said in it here. However, I recite some points. She reminded me that although the total costs incurred exceed £90,000, the respondent wanted a summary assessment limited to £20,000. Details of the costs incurred were set out in the bundle from pages 325 to 357. The main fee earner involved at the solicitors for the respondent was Mr D Browne, who has been a solicitor for over 10 years and is a partner in the practice. His hourly charging rate was different at times, being either £240 or £208. This was a complex matter, involving numerous employees of the respondent. At one stage, there were 15 named respondents, in addition to the University. The bundle of documents was extremely large, reflecting the factual complexity of the case. The response to the claimant's Scott schedule ran to 44 pages. The claims brought required the attention of a solicitor/partner of Mr Browne's experience. Ms Reindorf is a senior junior counsel of some 18 years call, and again because of the size and complexity of the case, it was reasonable for her to be engaged. The claimant has continued to behave in a completely unreasonable way by failing to appear at the hearing today and not having the courtesy of telling anyone that she would not be coming. The claimant exhibits a pattern of behaviour including failure to communicate; and multiple breach of orders. However, the most serious elements of bad behaviour relate to the claimant forging an entry on the respondent's website and hacking into the email account (for some months) of one of the former individual respondents, where the claimant was able to access personal items; and observe communications which would be protected by legal privilege.

6. My conclusions and reasons. I apply the law to the facts. I acknowledge once again that an Employment Tribunal is generally a cost-free environment. My starting point is that I am reluctant to make an award of costs. However, there are exceptions and a careful analysis is required before a decision is made. Unusually, I have received evidence from an expert in IT security, Mr Welland. He is part of a specialist team at the respondent which carries out computer security investigations. He has held this position since July 2012, and has more than 25 years' experience in the telecoms industry, developing secure mobile communications systems. He has professional security qualifications and has conducted numerous investigations in support of HR and other university departments, and assisted law enforcement agencies at a territorial and national level. I could see his investigation report in the bundle and the conclusions to them. He believed the likelihood of the claimant being responsible for forging the entry on the website and hacking into the former respondent's personal email account was in the range of 90 to 100%. He said, "In my opinion it is beyond reasonable doubt that the claimant did this." I was prepared to accept that conclusion, given Mr Welland's evidence to me. This leads me to conclude that the claimant did not act in good faith, when she instituted the proceedings, being prepared to rely on evidence from the respondent's website which she had fabricated. The claimant's misconduct has continued in hacking into a witness's email account. The claimant has therefore lied to the respondent and the tribunal, with no thought of the consequences of her conduct. The claimant has

behaved an outrageous way, wanting to inflict damage towards the respondent, its staff and their reputations. I stood back and considered the case as a whole; and concluded the claimant's conduct was vexatious, abusive and unreasonable, both at the point of bringing the proceedings and then continuing with them. The claimant's conduct amounted to an abuse of the process of the tribunal, the effect of which was to cause the respondent and its employees inconvenience, to say the least, and considerable expense in time and costs.

7. In carrying out my analysis at this stage, I concluded that the claimant had no reasonable prospect of success in any of her claims, which relied upon fabrication and falsehood from the beginning. I noted that the respondent's solicitors wrote to the claimant a costs warning letter (at page 166 in R1), dated 26 January 2018. The letter pointed out to the claimant the outcome of the investigation into the material posted on the respondent's website. It went on to state: "The content of the report casts considerable doubt over the veracity of your claim and it is our belief that the evidence clearly shows that you posted the material in question online yourself and/or falsified the document disclosed to us. We consider it inconceivable that a Tribunal will not conclude the same when presented with overwhelming evidence in support of this contention." The letter was marked in part: "Without prejudice save as to costs"; and the respondent invited the claimant to withdraw her claim by 4pm on Friday, 2 February 2018. If she withdrew, the respondent would not pursue the claimant for costs to that date, which were estimated to be in excess of £40,000 plus VAT. It was anticipated then the overall costs would exceed £100,000 plus VAT if the matter were to proceed to a full hearing. Unfortunately, the claimant did not engage with the offer, and carried on regardless, taking no notice of it.

8. In relation to the claimant's means, she has failed to provide relevant information. I know that she is 34 years of age and therefore has a relatively long working life before her. She works in a university environment, and the last work that the claimant was undertaking, according to information from the respondent, was at a university in Bristol. I know that in the event that the respondent seeks to enforce any order that I make, then the claimant has some protection in the County Court, where if she is prepared to engage in the process, and cooperate, her means will be taken into account. Given the history of the case so far, it would be a surprise if she did cooperate. The claimant is in breach of an order of the tribunal to disclose her address; and all communications have gone by email since she moved from her original address at the time of issue of her proceedings.

9. Once I had decided that the first stage of the test was met, I then proceeded to the second stage. Here, I considered that it was appropriate to make an order, because it was just, fair and proportionate to do so, and I ordered the claimant to pay the respondent assessed costs.

10. The total of the costs amounted to a sum more than £90,000 together with

VAT on top, plus the costs of and occasioned by the hearing today. However, the respondent was prepared, reasonably, to limit the application for costs to the sum of £20,000.00. I considered the grades of fee earner employed in the case, and the rates of charge applicable to them. I also considered counsel's fees, bearing in mind Ms Reindorf's length of call. These were reasonable and proportionate. I had regard to the volume of work undertaken; and considered the complexity and seriousness of the allegations. I concluded that an award in the sum of £20,000.00 was fair; and reflected the work involved in defending this claim, including the preparation for a 14-day hearing, which in the end was ineffective because of the conduct of the claimant. I accepted and adopted the submissions of Ms Reindorf, which I found very helpful. They were fair, reasonable, succinct and on point.

11. The claimant's conduct in bringing and conducting this case, which she knew was false and exaggerated, had no reasonable prospect of success. These factors, when added to the claimant breaching numerous tribunal orders, caused the respondent to have to spend a considerable sum of money in defending itself. Such expenditure was caused entirely by the claimant and it is just, fair and proportionate that she is ordered to pay costs assessed in the sum of £20,000 to the respondent.

Employment Judge Dimbylow
6 June 2018