EMPLOYMENT TRIBUNALS

Claimant
Ms K Drossou

Respondent
University of Sunderland

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Heard at North Shields **On** 12th December 2017

Before Employment Judge Garnon and Member Mr D Embleton

Appearances

For the Claimant: Mr R Gibson, Solicitor
For the Respondent: Mr P Gorasia of Counsel

JUDGMENT ON COSTS

We make a costs order that the respondent pay to the claimant £8500 + Vat = £10200

REASONS(bold print is our emphasis)

1. issues and Relevant Law

1.1. This is the claimant's application for costs of the preparation for and conduct of three hearings (a) the liability hearing (b) two remedies hearings and (c) this hearing.

1.2. Rule 76 of the Employment Tribunal Rules of Procedure 2013 (the Rules) includes

(1) A Tribunal may make a costs 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* ***the way that the proceedings (or part) have been conducted;*** *...*

We have emboldened to parts relied upon. Costs orders in the employment tribunal:

(a) are rare and exceptional.
(b) whether the Tribunal has the right to make a costs order is separate and distinct from whether it should exercise its discretion to do so. We call the first question the "threshold" i.e. we must first be satisfied one of the circumstances in Rule 76 exists.

(c) in determining whether to make a costs order, the paying party's conduct as a whole needs to be considered. Per Mummery LJ in Barnsley MBC v. Yerrakalva [2011] EWCA 1255 at para. 41:
"*The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had*."
(d) there is no rule/presumption that a costs order is appropriate because the paying party lied or failed to prove a central allegation of their case, see HCA International Ltd. v. May-Bheemul 10/5/2011, EAT.
(e) even if there has been unreasonable conduct making it appropriate to make a costs order, it does not follow the paying party should pay the receiving party's entire cost of the proceedings. Yerrakalva at para. 53.

1.3. In respect of each of the three hearings we must decide
1.3.1. whether there was unreasonable conduct of the proceedings
1.3.2. if so, whether to exercise our discretion to make a costs order
1.3.3. if so, how much to award

1.4. It is essential in costs hearings to maintain the distinction between unreasonable conduct of the respondent during the dismissal process and unreasonable conduct of the proceedings themselves. We were greatly assisted today by both representatives preparing thorough written submissions with appropriate exhibits .

1.5. We do not make criticism of the respondent's legal representatives. Solicitors and Counsel take instructions. In large institutions those instructions tend to come from the HR Department. We made these comments at the start of the liability judgment :

1.1. In Davies-v- Sandwell Metropolitan Council Mummery LJ said tribunals (ET's)

"are not obliged to read acres of irrelevant materials nor do they have to listen, day in and day out, to pointless accusations or discursive recollections which do not advance the case. On the contrary, the ETs should use their wide-ranging case management powers, both before and at the hearing, to exclude what is irrelevant from the hearing and to do what they can to prevent the parties from wasting time and money and from swamping the ET with documents and oral evidence that have no bearing, or only a marginal bearing, on the real issues.*

1.2. Case management orders by Employment Judge Johnson said the documents to be included in the trial bundle must be those to which the parties intend to refer, in evidence in chief or when cross-examining. The case was listed for one reading day and five hearing days . We were presented with over 1500 pages in the bundle and the witness statements, especially the respondent's, were long and repetitive. The difficulty this posed for us replicated that which confronted the claimant during the process which led to her dismissal.

1.6. Whoever bears any responsibility for the length of the statements and size of the bundle . if we made a costs order against every party or representative who has not mastered the art of précis would be making one every week. The unreasonable conduct we find took place goes far beyond the style of presentation of evidence.

2. Reasoning and Conclusions

2.1. The final issue has been made easy for us by the sensible agreement reached between the legal representatives. Rather than conduct a minute examination of the schedule of costs, we should decide how many unnecessary days of hearing we had. We should then take the cumulative total costs and based on a division of that by the total number of days of hearing reach a broad brush figure which does justice to both parties of an amount to award per "wasted" day. We accept Mr Gorasia's estimate of £4250 plus Vat per day. It will be easier if we deal last with the liability hearing which is the only one in respect of which we are prepared to make an order.

2.2. The remedy hearing took place over two days, weeks apart, because reinstatement was being considered. We made an order against the wishes and submissions of the respondent. The respondent did not comply so there was a second hearing to decide whether to make an additional award. We appreciate the claimant has been put to expense by this two-stage procedure but that is a consequence of the legislative provisions, not of unreasonable conduct of the proceedings by the respondent.

2.3. Mr Gibson argued, rightly we think, that the respondent's reasons for not complying with the reinstatement order were weak. However, a respondent is permitted to "dig in its heels" on reinstatement. As Mr Gorasia rightly submits in paragraph 11 of his argument, it has been subjected to penalty by the making of the additional award. The threshold for making a costs order in addition to that is not reached.

2.4. As for this hearing, again the threshold is not reached. We have awarded about 1/3 of the full amount Mr Gibson suggested we should. We do not say his claim was inflated in any way, we just did not agree with his assessment of how long the case would have taken but for the unreasonable conduct. It is disappointing no attempt was made to agree that by the claimant or the respondent .

2.5. As for the liability hearing without repeating the lengthy reasons we gave for the judgment they included that the HR Department of the respondent had contrived a means of avoiding going through the process of investigation of misconduct by the claimant dictated by BHS-v-Burchell. That means was to dress up matters related to conduct under the heading of "some other substantial reason". That was the unreasonable conduct of the respondent which led to them losing the case. It is behaviour before the dismissal not unreasonable conduct of the proceedings.

2.6. The unreasonable conduct of the proceedings was to try to maintain that position throughout the hearing by a technique designed to prevent the claimant and the tribunal " seeing the wood for the trees". The technique was to produce massive witness

statements which contained a great deal of jargon and a document bundle which required extensive reading by the claimant, and by us, to get to the truth . This inevitably prolonged the hearing .

2.7. Two points in particular illustrate this. First, the investigating officer, Ms Winter, who produced a lengthy statement, had also produced an even lengthier report for internal purposes. It appeared from her oral evidence she had found the claimant was more to blame than Ms Mearns for a breakdown in communications between staff in their department. However, she had not taken the fundamental steps of notifying the claimant clearly of the accusations against her or of speaking to her to ascertain her version. She sought to justify this by saying she was using an improvised "some other substantial reason" procedure. rather than a conduct procedure. She said in order to understand her reasoning we would have to read the whole report. We did so, pages 113 -178 and appendices pages 179 - 461. This is what we wrote in our reasons:

2.66. Ms Winter's conclusions include not only there was an irretrievable breakdown and the functionality of the HRM Team had been impaired but also

Sandy was the primary cause of the breakdown because:-

(a) She had had significant difficulty working with Lesley and other members of management, primarily because she was unwilling to accept management decisions or move forward after being given explanations and reasons for management decisions;

(b) She constantly challenged others in emails;

(c) The issues she had with Lesley and other managers had the potential to impact upon students (for example, the 'Turnitin' marking incident);

(d) She had been reticent to take steps to resolve matters, despite comments to the contrary;

(e) She had a reluctance to be managed, which became particularly apparent whilst being managed by Gillian Watson and Lesley;

(f) She had displayed an unwillingness to attend the most routine of meetings (either with Lesley or Faculty management) without third party support;

(g) Whilst Lesley had, at times, failed to deal with her relationship with Sandy, she had sought support and was willing to attend mediation and move on.

Whilst I recognised that Lesley had disregarded a management instruction not to engage in email contact with Sandy and had also been ***drawn into*** *long email exchanges, on balance I believed Sandy was primarily to blame and Lesley had been trying to respond to a challenging colleague.*

2.8. It was abundantly clear this was related to the claimant's conduct. We wrote:

As we said at the start of these reasons, it is not conducive to fairness to bury in a mass of paperwork the salient points. That is what the respondent did to the claimant. … When giving her evidence Ms Winter said to us we had to read her whole report and its appendices to understand her conclusion. We did, and still could not separate the wheat from the chaff . Neither could the claimant at this point in time.

2.9. Second, Professor Mennell was Deputy Vice-Chancellor. Her academic background is in forensic science and she was appointed to deal with the dismissal hearing. She is a lady whose evidence we described as a "breath of fresh air", who demonstrated intelligence, common sense and an instinctive sense of fairness . She had dealt with several dismissals on misconduct or capability grounds, but says the claimant was the first "*under the category of some other substantial reason*", which HR had told her it was. Our Employment Judge summarised to her the evidence she had given as to the facts she believed which caused her to dismiss . She agreed they were as stated. The Employment Judge then explained the difference between matters which relate to capability, those which relate to conduct and some other substantial reason. Then he asked what label she would attach to the facts. After only a moment's thought she replied " conduct". Her opinion as to the label was a plain English interpretation of the word "conduct" and common sense. Her evidence was protracted because she had been told by HR that Ms Winter's "some other substantial reason "was the "correct" view. A great deal of very relevant cross examination by Mr Gibson, and some questions from us, were needed to expose this .

2.10. Mr Gibson submits that had the respondent not adopted the tactic they did, a liability hearing which took seven days could have been concluded in 2 to 3 .We think this is too optimistic. However we accept it could and should have concluded in the five days allotted rather than the seven it took so base our award on two wasted days.

2.11 . The threshold for a costs order has been reached on the ground of "otherwise unreasonably" conducting the Tribunal proceedings. If a case is decided by a Tribunal finding on balance of probability a witness is not telling the truth, it should not result in a costs order. Something more is required. The "something more" is rare , but when it happens, a Tribunal will recognise it . In this case, there is no cross application for costs in respect of the two claims of race and disability discrimination which the claimant lost. I congratulate the respondent for not making such an application. The claimant put her case on those matters concisely through Mr Gibson and did not waste time in any way. That she lost is no reason for making costs order. If a party makes assertions it **knows** are untrue or misleading and maintains that causing even their own witnesses to struggle to support an a line of argument which has been devised for them (which is what happened) it is that "something more". The respondent officers who laid the foundations for dismissal by dictating to Professor Mennell how she should approach her task caused the evidence in this case to be prolonged in an attempt to "pull the wool over " our eyes. It is proper to exercise our discretion to make a costs order.

2.12. Costs orders are to compensate for costs **necessarily** incurred, not to punish the paying party. We have assessed is by how much the unreasonable conduct prolonged the hearing and applied an appropriate figure .

3. Employment Judge's postscript.

3.1. Two points which are irrelevant to the issue between the parties need in my view to be made. First, there is an error in the heading of the liability judgment as to the dates of hearing. We had to find two extra days for evidence and submissions, which were 13th November and 21st December 2015, and a further day for deliberations on 22nd December. Keenly aware of the danger of fading recollections, I had to re-arrange my sitting commitments to accommodate the availability of the representatives. The lay members did likewise with personal commitments. The overriding objective is a concept created when the Civil Procedure Rules were reformed under the direction of Lord Woolf in the early 1990s. His Lordship emphasised in a number of cases, notably, Beachley Properties v Edgar, that ensuring just handling of cases was not confined to the case in question. The proper administration of justice was not to be disrupted by parties' unreasonable conduct of proceedings I ran the risk of disrupting other litigant's cases, which fortunately did not happen.

3.2. Second, had both myself and the lay members not done the reading of documents outside the normal sitting hours of the Tribunal, we would have had to find an additional five days rather than three. It was not only the claimant but also the Tribunal which felt the consequences of the unnecessary prolongation of the hearing.

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Employment Judge Garnon

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 14th DECEMBER 2017