



EMPLOYMENT TRIBUNALS

Claimant
Mrs N Arfaoui

- v -

Respondent
The Lancaster
Landmark Hotel
Company Ltd

JUDGMENT (COSTS)

The Respondent's application for costs succeeds. An award of costs of £1,000 is made, payable by the claimant to the respondent.

REASONS

Background

1. The claimant's complaints of unfair dismissal, wrongful dismissal, a breach of the right to a written statement of the reasons for dismissal, and a breach of the right to written particulars of employment were heard by me at a three-day hearing from 24-26 September 2018. In a reserved judgment, sent to the parties on 28 September 2018, I found that all of the claimant's complaints failed.
2. The respondent's solicitors then made an application for costs against the claimant in a letter of 11 October 2018 to the tribunal.
3. The claimant had up until then been represented by Mr T Bashir of Briton Solicitors (Mr Bashir represented the claimant at the hearing referred to above).
4. By letter of 15 October 2018, the tribunal forwarded the respondent's costs application to Mr Bashir and asked for any comments on the application by 22 October 2018.
5. On 22 October 2018, Mr Bashir replied to the tribunal by email. He stated that the respondent's costs application had been passed over to the claimant; that the claimant had informed him that she had instructed a new firm of solicitors and that Briton Solicitors therefore no longer acted on behalf of the claimant and asked the tribunal to update its records. He advised that, if the claimant's new

solicitors had not yet made contact with the tribunal (which they had not), then the tribunal should please contact the claimant directly.

6. The tribunal therefore, at my direction, wrote to the claimant directly on 17 December 2018. The tribunal's communication stated:

"The claimant is ordered to confirm to the employment tribunal by 31 December 2018 whether she opposes the respondent's application for costs and why. The claimant should also provide details of her ability to pay any costs which may be awarded, including details of her savings, assets, liabilities and earnings."

7. There has since been no response to that letter or any other communication from or on behalf of the claimant.

8. I take into account the fact that, according to Mr Bashir, the claimant had been notified of the respondent's costs application as far back as 22 October 2018; that the tribunal had nonetheless specifically written to the claimant in person in relation to that application; and that, despite this, there has been no communication from the claimant. I further take into account the fact that it is now almost 4 months since the costs application was made and the obligation under the overriding objective to deal with cases fairly and justly, including, so far as practicable, avoiding delay. In the light of that, and given that the claimant has been given every opportunity to respond but has not done so, I consider that it is in the interests of justice to consider the respondent's costs application and to determine it at this point.

The law

9. The tribunal's powers to make awards of costs are set out in the Employment Tribunal Rules 2013 at rules 74-84. The test as to whether award costs comes in two stages:

1. First, has a party (or that party's representative) 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 did the claim or response have no reasonable prospect of success? If that is the case, the tribunal must consider making a costs order against that party.

2. Secondly, if that is the case, should the tribunal exercise its discretion to award costs against that party? In this respect the tribunal may, but is not obliged to, have regard to that party's ability to pay.

The respondent's costs application

10. The respondent's application runs to some nine pages and attaches a two-page schedule of costs incurred. The total costs incurred set out in the schedule amount to some £22,265, although the respondent limits the amount it seeks to recover to £20,000 (which is the maximum amount a tribunal can award without the requirement for a detailed assessment of costs).

11. The application is made on various grounds and on the basis both that the claimant/her representative acted vexatiously, abusively, disruptively or otherwise unreasonably in bringing the proceedings or the way they were conducted and that the claim had no reasonable prospects of success. Those areas are duly broken down into further subsections. I deal with each such subsection below, in terms of whether each of them satisfy the first stage of the test.

Stage I (unreasonable etc conduct)

1. Preparation of the case

12. The respondent submits that the claimant significantly delayed in providing her documents in the preparation for the case which caused disruption to the case management timetable and meant that the respondent was unable to properly address and defend the allegations made against it until late in the day. The respondent maintains that, although the claimant's list was provided only a day late, the claimant's representative did not provide the respondent with copies of the relevant documents despite numerous requests; this meant that the respondent couldn't produce the bundle for the final hearing as ordered and that the deadline for exchanging witness statements also had to be postponed. Consequently, the respondent was left with no choice but to make an application to the tribunal for strike out/an unless order and, only after the respondent had gone to the expense of making this application were the relevant documents provided by the claimant.

13. As I have received nothing from the claimant refuting this account and have no reason to doubt it, I accept it. Failure to comply with tribunal orders and to cooperate in the orderly preparation for the hearing is unreasonable conduct. Therefore, in this respect, the first stage of the test in relation to costs is satisfied.

14. I address this in more detail in relation to stage II, but I note that, other than the costs of making the strike out application, which directly resulted from the above, no indication is given by the respondent as to what costs were unnecessarily incurred by the respondent as a result of this unreasonable behaviour of the claimant/her representative.

2. Presentation of the claimant's evidence

15. the respondent maintains that, despite the fact that a list of issues was agreed between the parties, the claimant presented the tribunal with and sought to rely upon irrelevant witness and documentary evidence. By way of example, the respondent maintains that, instead of focusing on the reasonableness of the respondent's decision to dismiss, the witness statements of the claimant and Ms Rose consisted largely of "unsubstantiated allegations" (as I found in my judgment paragraph 42) about the character of several individuals referred to in the proceedings, many of which were scandalous and potentially defamatory; that these were irrelevant to the issues to be determined by the tribunal and that they were no doubt designed to harass the respondent out of spite or another alternate ulterior motive.

16. Furthermore, the respondent points out that I found the evidence of the claimant and Ms Rosa not to be reliable and that one of the central assertions of the claimant's case, namely that allegations of misconduct had been fabricated by the respondent, "developed and shifted" at tribunal and details "often of a salacious nature" were added at the cross examination stage, which were unsupported by any evidence (judgment paragraph 40).

17. The respondent points out that I found that a number of the claimant's contentions were not true including: the reason for the purported fabrication of the misconduct allegations (judgment paragraph 55); the purported fabrication of the notes of meetings (paragraph 58); her explanation for her misconduct (paragraphs 61 and 87); and the reason for the postponement of the disciplinary meeting (paragraph 81).

18. The respondent further points out that, as to Ms Rosa, her statement had "the appearance of having been designed to fit in with the succession of scandalous allegations" made by the claimant and the "sheer volume" of the allegations relating to so many individuals made it "inherently unlikely" that the material was true (paragraph 42).

19. Whilst I made these findings on the balance of probabilities and did not in my judgment go so far as to find that the claimant or Ms Rosa intentionally made untruthful statements to the tribunal (as it was not necessary to do so in order to determine the issues before me), I have no hesitation, where it is necessary to do so in order properly to determine this costs application, in finding that both the claimant and Ms Rosa knowingly made a number of untrue statements to the tribunal (including those referred to in the paragraphs above). Given the nature and number of these statements, it is not credible that the claimant was simply mistaken in what she said or set out in her witness statement; rather, I find that she knowingly lied to the tribunal.

20. In terms of the claimant's conduct, lying to the tribunal is clearly unreasonable conduct. The first stage of the test in respect of costs is therefore satisfied under this heading as well.

3. The wider conduct of the claimant and her representative at the hearing

21. The respondent maintains that the claimant gave her evidence in an uncooperative and disobliging manner. I accept this and it is evidenced in the findings which I made in my judgment. In particular, I found that the claimant "persistently failed to answer questions put to her, including even very simple questions which were a yes or no answer" and that, instead, she "frequently and repeatedly appeared to try to put forward things she wanted to say rather than answer the question she was asked" (paragraph 40). As a result, cross examination of the claimant, which should have taken approximately three hours, was extended to nearly 5 hours, "entirely because of the claimant's repeated and persistent failure to answer the questions put to her" (paragraph 26). This behaviour of the claimant was clearly unreasonable conduct and the first stage of the test in relation to costs is satisfied in this respect.

22. The respondent also submits that the conduct of the claimant's representative resulted in further delay. It maintains that he put questions to the respondent's first witness which were prolix, repetitive and irrelevant, such that he left himself little time to cross-examine the three remaining witnesses; that in the circumstances he applied to have the timetable extended (paragraph 22) and a small amount of additional time was provided in the interests of pragmatism (paragraph 23). The respondent's contention in this respect is borne out in my findings. However, I am not satisfied that Mr Bashir's behaviour in this respect was due to unreasonableness on his part; it is as likely to have been because of an inability on his part to focus on what was relevant and to plan his cross examination accordingly. I do not therefore find that this amounts to unreasonable behaviour and the first part of the test in relation to costs is not therefore satisfied in this respect.

23. The respondent also maintains that Mr Bashir made a number of serious but unsubstantiated allegations against the respondent and its witnesses, including: the alleged failure to disclose and/or destruction of relevant documents; and the fabrication of evidence by the witnesses; that he was reminded by me that such allegations required supporting evidence but failed to withdraw them and persisted in making them. This is true. However, again, it is as likely to have been done because of an inability on Mr Bashir's part properly to assess and focus on the case as it is due to unreasonable behaviour on his part. I do not therefore find that this amounts to unreasonable conduct and the first part of the test in relation to costs is not satisfied in this respect.

24. In relation to the aspect of unreasonable conduct which I have found under this subsection (the way the claimant gave her evidence), I agree that this meant that extra time was required to hear the case; however, that extra time amounted to a matter of around a couple of hours and, even if it had not been required, this would not have prevented the hearing extending into the third day of the three-day listing.

4. The claimant's conduct outside the hearing

25. The respondent maintains that the claimant's conduct outside of the hearing following the inception of the claim has been disruptive. It notes that, as set out in the witness statements of Ms Wolff and Mr Bush, whom I found to be consistent and credible, it was understood that the claimant had been approaching the respondent's customers and asking them to speak to managers so that she could be reinstated. The respondent maintains that such behaviour was highly inappropriate, off-putting for customers and risked affecting the respondent's revenue stream. Although the matter was not addressed at the hearing in any great detail (as it was not directly relevant to the issues), the claimant has had the opportunity to refute this allegation in the costs application and has not done so. I note that I found both Ms Wolff and Mr Bush to be consistent and credible and I therefore accept these assertions. Furthermore, for the reasons set out by the respondent in its costs application, I agree that this behaviour on the part of the claimant was unreasonable. The first part of the test in relation to costs is therefore satisfied in this respect.

Stage I (no reasonable prospects of success)

26. The respondent maintains that the various complaints brought by the claimant had no reasonable prospect of success. I deal with each of them in turn.

27. A complaint for a breach of the right to an itemised pay statement was withdrawn at the start of the hearing. I never heard it and so I am not in a position to say whether it had no reasonable prospect. I do not, therefore, make a finding that it had no reasonable prospect. I would add that, even if it had no reasonable prospect, a claim of that nature is unlikely to have required very much preparation work by the respondent (if any), so it is highly unlikely that any significant costs (or any costs at all) would flow from this complaint.

28. As to the complaint of a failure to provide a written statement of particulars, the outcome of this complaint was not initially clear-cut, albeit in the end I accepted that the claimant was provided with such a statement. I do not, therefore, considered that the allegation had no reasonable prospect of success. Furthermore, whilst an award in this respect is contingent upon the success of one of the other complaints, in the absence of all of them having no reasonable prospect, I do not find that the allegation regarding a written statement of particulars had no reasonable prospect.

29. The complaint of a failure to provide written reasons for dismissal had no reasonable prospect of success. The claimant herself knew that she did not make a request for written reasons (so the section was not engaged) and, furthermore, it was clear from the face of the documents that written reasons had indeed been provided. This should have been obvious to the claimant/her representative from the disclosure stage of the proceedings at the latest and this complaint should have been withdrawn.

30. I would note, however, that very little time needed to be devoted to this complaint and, whilst the respondent has not made any submissions in this respect, I find that very little cost (if any at all) can have been incurred as a result of having to defend this complaint.

31. Finally, I turn to the unfair dismissal/wrongful dismissal complaints. Those complaints failed and I found that the reason for dismissal was clearly misconduct and the decision to dismiss fell “well within the range of reasonable responses open to a reasonable employer” (paragraph 110). I note the respondent’s comments about the way the claimant conducted the litigation and the various assertions she made during her evidence (which I have found to have been untrue); I similarly note the respondent’s submission about the way the claimant (and her family) behaved towards the respondent’s employees during the internal proceedings. I accept that that conduct was unacceptable and, as the respondent submits, it undermines the claimant’s case. However, notwithstanding that, and whilst I accept that, on the facts, the unfair dismissal and wrongful dismissal complaints were always unlikely to succeed, I do not accept that they satisfy the high standard of having had no reasonable prospect

of success. However understandably aggrieved the respondent feels about the way the claimant has conducted this litigation, had she simply presented unfair dismissal and wrongful dismissal complaints where she challenged, for example, the reasonableness of the respondent's belief in the misconduct and the appropriateness of the sanction (without all the inflammatory untruths that have been put forward in these proceedings), it is unlikely that the respondent would have expected a finding that those complaints had no reasonable prospect of success. The first part of the test in relation to costs is not therefore satisfied in this respect.

Stage II

32. I therefore need to decide whether to exercise my discretion as to whether to award costs (and in what amount) on the basis of those elements of the application which satisfied the first stage in terms of unreasonable conduct/no reasonable prospect of success.

33. Turning to the latter first, the only complaint which I found had no reasonable prospect of success was the complaint of a failure to provide written reasons. As already indicated, this was a small self-contained complaint which was easily disposed of and (although the respondent has made no submissions in this respect) I do not consider that any substantial costs (if any at all) were incurred by the respondent as a result of having to defend this complaint. I do not, therefore, make a costs award on this basis.

34. I turned to the various examples of unreasonable conduct.

35. The claimant's/her representative's unreasonable conduct in the preparation of the case, which caused the respondent to apply for a strike out/unless order, caused the respondent to incur unnecessary cost. Whilst the breakdown in the costs schedule is reasonably detailed, it is not possible to ascertain precisely what additional cost was incurred as a result of this unreasonable conduct. I therefore use my own discretion in this respect. I note that counsel (Ms Tutin, call 2013), incurred £1812.50 in "drafting the application for strike out and reviewing correspondence". Whilst this is not broken down further, I estimate £1,000 spent in drafting the application, a cost therefore incurred because of the claimant's/her representative's unreasonable conduct. (I note that, in the breakdown of the costs of the solicitor in charge with the case, none of the costs are said to be in relation to these matters (rather they are said to be for matters such as instructing counsel, serving the ET3, amending witness statements etc); I do not therefore find that any solicitor's costs flowed from this unreasonable conduct.)

36. I turn to the unreasonable conduct of the claimant in terms of how she presented her case, both in her own evidence and the decision to call Ms Rosa and what has been described in subsection 3 above as her "wider conduct at the hearing". I consider that, had the claimant chosen to run her case differently and in a way that was not unreasonable, the evidence and submissions could have been concluded earlier than they were. Having said that, it is still likely that they would have concluded at some point on the third day of the hearing, which would

mean that the costs of the respondent attending on the third day would still have been incurred. Even if the evidence and submissions could have been concluded by the end of the second day, it is still likely that, rather than reserving my decision, I would have delivered that decision orally on the third day, which would have meant that the parties would have attended on the third day such that there would be no costs saving for the respondent. Therefore, notwithstanding the claimant's unreasonable conduct in this respect, I do not consider that any additional costs have flowed from that conduct and I make no costs award in this respect.

37. Finally, I turn to the unreasonable conduct of the claimant outside the hearing. However blameworthy this was, it was not conduct which caused the respondent to incur the costs sought. I do not therefore make any costs award in this respect.

38. In summary, I am minded to make an award of costs of £1,000, in relation to Ms Tutin's costs in relation to the strike out application.

39. In this respect, I take into consideration three further matters.

40. First, I do not consider that the level of costs incurred by Ms Tutin in this respect is unreasonable for a barrister who is a 2013 call.

41. Secondly, although the application is for the VAT in relation to the costs occurred as well as the costs, I do not include any amount for VAT. The point has not been addressed in the application but it is highly likely that the respondent as a trading company will be able to recover any VAT.

42. Finally, I turn to the question of the claimant's means. I note that she has not responded to the costs application. Furthermore, the tribunal's letter to her of 17 December 2018 specifically asked her to "provide details of her ability to pay any costs which may be awarded, including details of her savings, assets, liabilities and earnings". The claimant was therefore specifically given the opportunity to address this issue and she has not done so. There is therefore no evidence before me that the claimant is unable to pay these costs. Furthermore, the proposed costs are of a limited amount (£1000). In the light of this, and in the absence of any evidence to the contrary, I find on the balance of probabilities that the claimant is able to pay these costs.

Conclusion

43. I therefore make an award of costs of £1,000, payable by the claimant to the respondent.

Employment Judge Baty

Dated: 6 February 2019

Judgment and Reasons sent to the parties on:

7 February 2019

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For the Tribunal Office