



EMPLOYMENT TRIBUNALS

BETWEEN
AND

Claimant
Mrs L Guest

Respondent
Dresden House
Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL COSTS APPLICATION

HELD AT Birmingham ON 18 March 2019

EMPLOYMENT JUDGE GASKELL

Representation

For the Claimant: Written Representations
For Respondent: Written Representations

JUDGMENT

The judgment of the tribunal is that:

Pursuant to Rules 74 – 78 & 82 of the Employment Tribunals Rules of Procedure, the respondent's application for costs is refused.

REASONS

Introduction

1 Following a hearing in tribunal on 10 and 11 August 2018, by a Reserve Judgement promulgated to the parties on 30 November 2018, the claimant's claims for unfair and wrongful dismissal were dismissed. By a letter dated 5 December 2018, the respondent applies for costs. Both parties have consented to the Costs Application being determined on paper and without a hearing.

The Law

2 **The Employment Tribunals Rules of Procedure 2013**

Rule 74: Definitions

(1) "Costs" means fees, charges, disbursements or expenses incurred by or on behalf of the receiving party (including expenses that witnesses incur for the purpose of, or in connection with, attendance at a Tribunal hearing). In Scotland

all references to costs (except when used in the expression “wasted costs”) shall be read as references to expenses.

(2) “Legally represented” means having the assistance of a person (including where that person is the receiving party’s employee) who—

- (a) has a right of audience in relation to any class of proceedings in any part of the Senior Courts of England and Wales, or all proceedings in county courts or magistrates’ courts;
- (b) is an advocate or solicitor in Scotland; or
- (c) is a member of the Bar of Northern Ireland or a solicitor of the Court of Judicature of Northern Ireland.

(3) “Represented by a lay representative” means having the assistance of a person who does not satisfy any of the criteria in paragraph (2) and who charges for representation in the proceedings.

Rule 75: Costs orders and preparation time orders

(1) A costs order is an order that a party (“the paying party”) make a payment to—

- (a) another party (“the receiving party”) in respect of the costs that the receiving party has incurred while legally represented or while represented by a lay representative;
- (b) the receiving party in respect of a Tribunal fee paid by the receiving party; or
- (c) another party or a witness in respect of expenses incurred, or to be incurred, for the purpose of, or in connection with, an individual’s attendance as a witness at the Tribunal.

(2) A preparation time order is an order that a party (“the paying party”) make a payment to another party (“the receiving party”) in respect of the receiving party’s preparation time while not legally represented. “Preparation time” means time spent by the receiving party (including by any employees or advisers) in working on the case, except for time spent at any final hearing.

(3) A costs order under paragraph (1)(a) and a preparation time order may not both be made in favour of the same party in the same proceedings. A Tribunal may, if it wishes, decide in the course of the proceedings that a party is entitled to one order or the other but defer until a later stage in the proceedings deciding which kind of order to make.

Rule 76: When a costs order or a preparation time order may or shall be made

- (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.

Rule 77: Procedure

A party may apply for a costs order or a preparation time 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.

Rule 78: The amount of a costs order

- (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 subparagraphs (b) to (e) of paragraph (1) may exceed £20,000.

Rule 82: Procedure

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.

3 DECIDED CASES

Beynon & others –v- Scadden & others [1999] IRLR 700 (EAT)

Gee –v- Shell UK Ltd. [2003] IRLR 82 (CA)

An award of costs in the employment tribunal is the exception rather than the rule. Costs are compensatory not punitive.

Salinas –v- Bear Stearns International Holdings Inc. & another [2005] ICR 1117 (EAT)

The reason why costs orders are not made in the vast majority of employment tribunal cases is that the high hurdle has to be overcome for a costs order to be made has not, in fact, been overcome.

Beynon & others –v- Scadden & others [1999] IRLR 700 (EAT)

Monaghan –v- Close Thornton Solicitors UKEAT/0003/01

Beat –v- Devon County Council & another UKEAT/0534/05

Lewald-Jeziarska –v- Solicitors in Law Ltd. & others UKEAT/0165/06

The tribunal must not move straight from a finding that conduct was vexatious, abusive, disruptive, unreasonable or misconceived to the making of a costs order without first considering whether it should exercise its discretion, to do so.

Yerrakalva –v- Barnsley MBC UKEAT/0231/10

There is no general rule that withdrawing a claim is tantamount to an admission that it is misconceived. There is no requirement for a direct causative link between the unreasonable conduct and the costs incurred but there should be some connection.

Dyer –v- Secretary of State for Employment UKEAT/0183/83

Whether conduct is unreasonable is a matter of fact for the tribunal to decide. Unreasonableness has its ordinary meaning.

McPherson –v- BNP Paribas [2004] ICR 1398

The late withdrawal of proceedings is not of itself evidence of unreasonable conduct. The claimant's conduct overall must be considered. But a late withdrawal is a factor in a case where the claimant might reasonably have been expected to withdraw earlier.

Keskar –v- Governors of All Saints Church of England School [1991] ICR 493

A tribunal is entitled to take account of whether a claimant ought to have known his claim had no reasonable prospect of success.

Kaur –v- John Brierley Ltd. UKEAT/0783/00

An award of costs against the claimant was upheld in a case where the claimant had failed, despite several requests, to properly set out her claim. She proceeded with the claim only to withdraw at the commencement of the trial.

Vaughan –v- Lewisham LBC (No 2) [2013] IRLR 713 (EAT)

There is no requirement for the receiving party to have written a costs warning letter. It is not wrong in principle for an employment tribunal to make an award of costs against a party which that party is unable to pay immediately in circumstances where the tribunal considers that the party may be able to meet the liability in due course.

The Basis of the Application

4 The respondent's case is that the evidence pointed overwhelmingly to a fair dismissal by reason of conduct. It is suggested that the claimant's claim had no reasonable prospect of success. Further, on 27 March 2018, the respondent's solicitors wrote to the claimant setting out what they saw as the weaknesses of her claim and putting her on notice that, if she pursued the claim further, and the claim was dismissed, a costs order would be sought. It is suggested that claimants continued pursuit of the claim after that letter amounted to unreasonable conduct. The amount of costs sought is £6981.30.

Discussion

5 I agree with the respondent's submission that the evidence was strong that the claimant was responsible for the prescribing error leading to a prolonged overdose administered to patient JB. But there is more to unfair and wrongful dismissal claims than the proof of misconduct: in the unfair dismissal claim, the tribunal also had to consider the reasonableness of the sanction; in the wrongful dismissal claim the tribunal had to consider whether the claimant's conduct of itself amounted to a fundamental breach of the employment contract.

6 The clear rule in Employment Tribunal cases is that the cost do not follow the event. It is not sufficient for a party merely to have been successful; the other party must have acted in one of the ways set out in Rule 76(1).

7 As I observed in the judgement on liability, the claimant's long service unblemished save for a recent final written warning (which the respondent specifically excluded as part of its reasons for dismissal) were such that it might be regarded that the respondent's decision to summarily dismiss was a harsh decision. In these circumstances, in my judgement, the claimant was entitled to seek a determination from the tribunal as to whether or not the decision to dismiss her was in fact within the range of reasonable responses. The decision

on that point went against her, but in my judgement, it was not unreasonable for her to pursue the claim.

8 The same observation arises with the wrongful dismissal claim: even if misconduct on the claimant's part could be established (as it was), she was entitled to seek the determination of the tribunal as to whether such conduct was so severe as to amount to repudiatory breach of contract on her part. Again, I found against her, but, in my judgement, it was not unreasonable for her to pursue the matter.

9 The costs warning letter of the 27 March 2018 contains a brief analysis of the respondent's case, but there is nothing contained within the warning which, in my judgement, rendered it unreasonable for the claimant to seek the tribunal's determination on the points referred to above.

10 In the circumstances, I conclude that the claimant has not behaved unreasonably; and, looked at without the benefit of hindsight, it cannot sensibly be argued that the claim had no reasonable prospect of success. (If there had been an application for strikeout pursuant to Rule 37 in advance of the hearing, such an application could not have succeeded.)

11 In the circumstances, my judgement is that none of the gateways contained in Rule 76(1) apply in this case. Accordingly, there can be no order for costs.

12 Accordingly, the application is refused.

Employment Judge Gaskell
19 March 2019