Case No: 3300257/2017

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs E Clarke	**v**	**Interserve FS (UK) Limited**

Heard at: Watford **On:** 15 March 2019

Before: Employment Judge Bedeau

Members: Mr I Bone
Miss H Edwards

Appearances:

For the Claimant: In person
For the Respondent: Miss Ahmad, Counsel

RESERVED JUDGMENT ON COSTS

The claimant is ordered to pay the respondent's costs in the sum of £20,000.

REASONS

1. On 23 January 2019, the Tribunal promulgated its judgment on liability and listed the case for a costs hearing to be heard on 15 March 2019. In our liability judgment, we found against the claimant on all claims against the respondent.

2. In an e-mail to the Tribunal dated 8 March 2019, the claimant applied for a reconsideration of the judgment. She submitted a 26 page, closely typed, application challenging the evidence before the Tribunal and the Tribunal's findings of fact as well as conclusions.

3. The application was considered by the Employment Judge under Rule 72 (1), Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 and was refused as he decided that there was no reasonable prospect of the judgment being either varied or revoked as the claimant's challenges were to the evidence and the Tribunal's findings of fact.

The Evidence

4. The Tribunal heard evidence from Mr David Marsh, Catering Manager, and from Ms Karen Ward, Employment Paralegal.

5. In addition to the oral evidence, the parties produced a bundle of documents comprising of 212 pages.

Findings of Fact

6. In our liability judgment we found that the claimant had been suspended from work on 15 July 2016, and during the period of her suspension, she was engaged in employment as a chef with another company but did not disclose that fact to the respondent until she gave evidence during the liability hearing.

7. The respondent paid the claimant the sum of £4,000 gross, during her suspension. We now order that that sum be repaid by the claimant as it was the total amount paid to her while she was working for another employer during her suspension. It was paid into her bank account by the respondent on 11 January 2017. On 11 March 2017, a further payment of £2,400 as back pay, was also paid into her account but she failed to return to work following the decision taken by the respondent that she should be reinstated. On 11 June 2017, a further sum representing 6 days' back pay was paid to her. (pages 203, 205 and 208 of the bundle).

8. We heard evidence from both the claimant and Miss Ward about the conduct of proceedings and we do not propose to make any findings save for the Unless Order issued by the Employment Tribunal on 3 July 2018 for the claimant to provide details of her claim for unpaid leave; schedule of loss; and copies of any relevant documents in her possession. On the same day, she sent to the Tribunal and the respondent, a signed schedule of loss. She stated that she was working hard to find a better job on comparable terms to the one she had with the respondent. She claimed expenses of £20 per month in search of employment. Her ongoing losses she assessed at £1,450 per month; plus pension loss; and loss of statutory rights of £500. She applied for an uplift for alleged failure on the part of the respondent to follow the ACAS code in respect of the alleged denial of her right of appeal, as well as 2 weeks' notice pay and accrued unpaid holiday for the years 2014-2018.

9. The Unless Order was issued as the claimant failed to comply with the order of 3 January 2017 to serve a schedule of loss by 17 January 2017.

10. We find that she did not provide in her schedule of loss a truthful account as to her financial position and failed to serve documents relevant to remedy, to include evidence of all attempts to find alternative employment, such as Job Centre records, advertisements responded to and all correspondence with recruitment agencies or prospective employers. She failed to disclose itemised pay slips from her current employer, nor did she provide a copy of her contract of employment or terms and conditions of her new employment. We bear in mind that she had been working for her current employers since her suspension in July 2016.

11. On 1 October 2017, the respondent's solicitors wrote to the claimant a "without prejudice save as to costs" letter in which she was made aware that they believed they had a strong defense to her claims and that their witness statements would support their position. They did not believe she had evidence in support of her claims. They asserted that her employment was terminated fairly because she failed to return to work despite a decision that she should be reinstated. An offer of £3,000 to settle her case was made. She was warned that should the respondent be successful at the hearing, or that she was successful but awarded £3,000 or less, they would be applying to the Tribunal for a costs order. They wrote:

> "…. We wish to bring to your attention the Employment Tribunals (Constitution and Rules of Procedure), Regulations 2013. Under these rules, the Tribunal can order one party to meet the costs incurred by another party or to make a contribution of those costs up to £20,000 (Rule 78). We wish to make it abundantly clear that unnecessary and substantial costs will be incurred by the respondent if this matter proceeds to a hearing from 22 October 2018. You are on notice that if the respondent is successful at the hearing (which it believes it will), or if you are successful but awarded £3,000 or less, we will apply for costs. However, if you accept the respondent's offer and their agreement via COT3, wording with ACAS by 4pm Friday 5 October 2018, the respondent agrees not to pursue you for its costs. Should you wish to accept the respondent's offer, please contact Sandra Hunt the ACAS conciliator assigned to this matter…. . If the offer is not accepted the respondent reserves the right to produce a copy of this letter to the Employment Tribunal in support of an application for recovery of its full costs from you, including barrister and witness costs, which will be significant. I would strongly encourage you to seek independent legal advice on the content of this letter and its potential impact upon yourself" (88-89).

12. The claimant presented her first claim on 21 December 2016 before Watford Employment Tribunal. Her second claim was presented before the Midlands West Employment Tribunal on 5 May 2017.

13. Although the matter was protracted, the Tribunal was unable to find that the claims were malicious, vexatious and/or scandalous.

14. In our judgment, we stated the following:

> "We find that the claimant actively operated a deception on the respondent by deliberately failing to disclose details of her current employment until after commencement of this hearing. Her credibility, in our view, is in issue. Where her evidence came into conflict with the evidence given by the respondent's witnesses, we preferred the evidence of the respondent's witnesses. The respondent is seeking the return of £4,000 gross paid to the claimant in the belief that she was not working between 15 July -21 December 2016 …. The respondent is entitled to recover the gross sum of £4,000 paid to the claimant covering the period of her suspension" (122-136)

15. In the respondent's schedule of loss, there is a claim for counsel's fees for hearing on 3 January 2018 and at the liability hearing on 22 – 29 October 2018, as well as her attendance on 15 March 2019. The total sum being £9,790.20.

16. In addition, it claims for cost in respect of its witnesses' attendance during the liability hearing in the total sum of £5,015.60.

17. Further, payments were made to the claimant during her suspension while she was working for her current employer from 15 July 2016 – 10 August 2016, £1,086.75; 11 January 2017 and 11 March 2017 back payment of wages, the total net sum of £5,639.96. Holiday pay was paid on 11 June 2017 in the sum of £599.12. Giving the total of £7,325.83.

18. Although the total costs in the schedule is £22,131.63, the respondent is not seeking a costs assessment but a costs order in the sum of £20,000, the limit of our jurisdiction.

19. We considered the evidence given by the claimant in respect of her means. She stated that she works as a chef, contractually 30 hours a week but on average 40 hours a week. She is paid monthly, £9 per hour. She stated her monthly pay gross is £1,400. She said she has no savings. She owes her local council £13,000 in Council Tax and £6,000 rent arrears. She also has a £2,000 water bill. Her rent is £600 per month. She pays monthly £80 towards gas; electricity £80; water £40; and food £200.

20. She said she borrowed money from friends and family when she was at university. She has two independent children, young men 24 and 25 years old who, she said, are currently abroad looking for work. She lives in a three-bedroomed house. Her evidence in relation to the circumstances of her sons, was confusing. It was unclear why they had to leave the country to look for work; whether they are currently working; and, if so, whether they contribute towards the household expenses? Despite being in rent arrears with the council she said that, in 2016, she wanted to buy her council flat but was unable to tell the Tribunal how much she was going to pay for it. She was still not prepared to disclose the identity of her employer as she believes that it would be an opportunity for the respondent to secure her dismissal. She asserted that the "without prejudice" offer by the respondent's solicitors was an acknowledgement of the weaknesses in the respondent's case.

The Law

21. The costs provisions are in rules 74 to 84, schedule 1, Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, as amended. "Costs" includes any fees, charges, disbursements or expenses including witness expenses incurred by or on behalf of the receiving party, rule 74(1).

22. The power to make a costs order is contained in rule 76. Rule 76(1) provides,

> "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."

23. In deciding whether to make a costs order the Tribunal may have regard to the paying party's ability to pay, rule 84.

24. In the case of Yerrakalva v Barnsley Metropolitan Borough Council [2011] EWCA Civ 1255, the Employment Judge in the case awarded the respondent 100% of its costs based on the claimant's lies prior to her decision to withdraw. On appeal the EAT said that it was unable to see how the lies told at the prehearing review caused the respondent any loss at all from which they were entitled to be compensated. She succeeded in her appeal. On appeal to the court of Appeal, Mummery LJ giving the leading judgment held:

> "The vital point in exercising their discretion to order costs is to look at the whole picture of what happened in the case and asked 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 affects it at that. The main thrust of the passages cited above from my judgement in McPherson's case was to reject as erroneous the submission to the court that, in deciding whether to make a costs order, the employment tribunal had to determine whether or not there was a precise causal link between the unreasonable conduct in question and the specific costs the claimant. In rejecting that submission I have no intention of giving birth to erroneous notions, such as that causation was irrelevant or the circumstances had to be separated into sections and each section to be analysed separately so as to lose sight of the totality of the relevant circumstances….
>
> 52 In my judgement, although the employment tribunal had jurisdiction to make a costs order, it erred in law in the exercise of its discretion. If, as should have been done, the criticisms of the council's litigation conduct had been factored into the picture as a whole, the employment tribunal would have seen that the claimant's unreasonable conduct was not the only relevant factor in the exercise of the discretion. The claimant's conduct and its effect on the costs should not be considered in isolation from the rest of the case, including the council's conduct and its likely effect on the length and costs of the prehearing review."

25. In the case of Vaughan v London Borough of Lewisham UKEAT/0533/12/SM, the Employment Appeal Tribunal held that there was no error of law when the Employment Tribunal in awarding costs took into account whether there was a reasonable prospect of the claimant being able, in due course, to return to well-paid employment and be in a position to pay costs. Also in that case it was held that the failure on behalf of the respondent to apply for a deposit order is not necessarily an acknowledgement that a claim has a reasonable prospect of success as there are a variety of reasons why such a course of action may not be adopted, such as additional costs involved in having the matter considered at a preliminary hearing and which may not deter the claimant.

26. The Tribunal have to consider, once the claims have been brought, whether they were properly pursued, Npower Yorkshire Ltd v Daly UKEAT/0842/04.

27. Knox J, in Keskar v Governors of All Saints Church England School and Another [1991] ICR 493, page 500, paragraphs E-G, held,

> "The question whether a person against whom an order for costs is proposed to be made ought to have known that the claims he was making had no substance, is

> plainly something which is, at the lowest capable of being relevant, and we are quite satisfied from the decision itself, in the paragraph which I have read and need not repeat, that the industrial tribunal did have before it the relevant material, namely that there was virtually nothing to support the allegations that the applicant made, from which they drew the conclusion that he had acted unreasonably in bringing the complaint.
>
> That in our view, does involve an assessment of the reasonableness of bringing the proceedings, in the light of the non-existence of any significant material in support of them, and to that extent there is necessarily involved a consideration of the question whether the applicant ought to have known that there was virtually nothing to support his allegations."

28. We have also taken into account the cases of AQ Ltd v Holden [2012] IRLR 648, a judgment of the National Industrial Relations Court, and Oni v Unison UKEAT/0370/14/LA.

29. It was held by Sir Hugh Griffiths in a judgment of the Employment Appeal Tribunal, in the case of E.T Marler v Robertson [19974] ICR 72, under the old "frivolous or vexatious" costs requirements that:

> "If the employee knows that there is no substance in his claim and that it is bound to fail, or if the claim is on the face of it so manifestly misconceived that it can have no prospect of success, it may be deemed frivolous and an abuse of the procedure of the tribunal to pursue it. If an employee brings a hopeless claim not with any expectation of recovering compensation but out of spite to harass his employers or for some other improper motive, he acts vexatiously, and likewise abuses the procedure. In such cases the tribunal may and doubtless usually will award costs against the employee.", page 76 D-F.

30. In the case of Oni v Unison UKEAT/0370/14/LA, Simler J, President, re-stated the principles, namely that the tribunal has a wide discretion in deciding whether to award costs. It is a two-stage process. The first being, to determine whether the paying party comes within one or more of the parameters set out in rule 76. The second, is if satisfied that one or more of the requirements has been met, whether to make the award of costs. However, costs had to be proportionate and not punitive and reasons must be given.

31. In Arrowsmith v Nottingham Trent University [2011] EWCA Civ 797, a case where the claimant was ordered to pay costs of £3,000 because she had made a case dependent on advancing assertions that were untrue. The Court of Appeal held that under rule 41(2) the tribunal was not obliged to take her means into account although it had done so. The fact that her ability to pay was limited, in that she was unemployed and no longer in receipt of statutory maternity pay, did not require the tribunal to assess a sum limited to an amount she could pay. The amount awarded was properly within the tribunal's discretion.

32. In relation to the exercise of the tribunal's discretion whether to take into account the paying party's ability to pay, under the old rules, HHJ Richardson, in the case of Jilley v Birmingham & Solihull Mental Health NHS Trust (EAT/584/06), held:

> "The first question is whether to take ability to pay into account. The tribunal has no absolute duty to do so. As we have seen, if it does not do so, the County Court

> may do so at a later stage. In many cases it will be desirable to take means into account before making an order; ability to pay may affect the exercise of an overall discretion, and this course will encourage finality and may avoid lengthy enforcement proceedings. But there may be cases where for good reason ability to pay should not be taken into account: for example, if the paying party has not attended or has given unsatisfactory evidence about means."
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> "If a tribunal decides not to do so, it should say why. If it decides to take into account ability to pay, it should set out its findings about ability to pay, say what impact this has had on its decision whether to award costs or on the amount of costs, and explain why. Lengthy reasons are not required. A succinct statement of how the tribunal has dealt with the matter and why it has done so is generally essential."

Submissions

33. We considered the submissions of the claimant and Ms Ahmed, counsel on behalf of the respondent. Ms Ahmed submitted that the respondent is entitled to its costs as the claimant did behave vexatiously, scandalously, maliciously or otherwise unreasonably in bringing the claims and in her conduct of her case.

34. The claimant denies she had behaved in the ways alleged and submitted that she is entitled to costs based on the respondent's lawyers' conduct of proceedings. She asserted that she had been denied documents which would have been of assistance to her in presenting her case and in preparing her schedule of loss. In any event, she had no money to pay an award of costs.

Conclusions

35. We are satisfied that the claimant's conduct of proceedings was unreasonable. She actively operated the deception on the respondent during her suspension from employment up to the liability hearing when she disclosed, for the first time, that she was in employment with her currently employer. Her credibility was and remain an issue in the case. Her account of her sons' employment circumstances we do not accept that she told us the truth, nor do we accept that we have been told the truth about her finances. It defies belief that she does not know how much she was prepared to pay for her council flat. Her schedule of loss did not disclose her true employment circumstances.

36. The respondent has been put to expense in preparing for the liability hearing and its costs are set out to its schedule.

37. In relation to the attendance of the respondent's witnesses, we have come to the conclusion that:

    i. Mr Adrian Haigh's attendance of 2 days in the sum of £800 should be awarded.

    ii. It was not necessary for Mr Nick Turner to have been present from 22-26 October, we, therefore, award the respondent two days' costs in the sum of £669.

iii. David Marsh, who was in the Tribunal's view, the main witness, the respondent is entitled to his expenses incurred in attending in the sum of £836.88.

iv. It was not necessary for Ms Kelly McPhillips to be present from 22-26 October, we would award two days' expenses in the sum of £369.24.

v. The respondent is entitled to costs incurred in Mr Paul Pradella's attendance of two days in the sum of £448.26.

38. The total expenses to be awarded for the respondent's witnesses' attendance is £3,123.38.

39. In addition, we award the cost of the counsel's attendance and fees of £9,790.20.

40. Further, we award sum of £7,325.83 in respect of the monies paid to the claimant during her suspension.

41. The total sum awarded is, therefore, £3,123.38, plus £9,790.20 and £7,325.83, which comes to £20,239.41.

42. We did not accept the claimant's evidence as to her financial circumstances. She knew when she received the judgment in January 2019, that there would be a costs hearing and yet she failed to produce any documentary evidence of her ability to pay costs.

43. In addition, knowing that she operated a deception on the respondent by not revealing her current employment, the offer made to her of £3,000 was reasonable, as her credibility was in issue.

44. For all of the above reasons, we have come to the conclusion that the respondent has satisfied Rule 76 (1)(a), Employment Tribunal's (Constitution and Rules of Procedure) Regulation 2013, Schedule 1.

45. We have taken into account the claimant's ability to pay following Arrowsmith and Jilley. We are satisfied that she works at least 40 hours a week and is in a position to pay a costs order. We, therefore, order that she should pay the respondent's costs of £20,000.

_____
Employment Judge Bedeau

Date: …12..06.19……..

Judgment sent to the parties on

.....12.06.19.....

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For the Tribunal office