# EMPLOYMENT TRIBUNALS

| **Claimant** | | **Respondent** |
|---|---|---|
| Miss N Ocekci | **v** | Tom Paxman |

**Heard at:** Bury St Edmunds **On**: 29 July 2019

**Before:** Employment Judge KJ Palmer

**Appearances**
**For the Claimant:** In person
**For the Respondent:** Miss A Rokad (Counsel)
**For the Claimant's Representatives:** Merseyside Employment Law Limited (MEL), Charles Davey (Counsel)

## RESERVED JUDGMENT

1. The Respondent's application for a Costs Order against the Claimant is refused and is dismissed. The Respondent's application for a Wasted Costs Order against the Claimant's representative MEL is refused and is dismissed.

## REASONS

### The History of this matter

1. The Claimant who was at the time unrepresented presented a claim to this Tribunal which was received on 13 August 2018. That claim on the face of it included claims for race discrimination and unlawful deduction of wages.

2. I do not propose to go into the details of the Claimant's claims as these are more than adequately set out in my Judgment of 13 December 2018.

3. However on 19 September 2018 the Tribunal received a letter from MEL indicating that they had been instructed by the Claimant to represent her in this claim. It is worth mentioning that did MEL did not in this letter indicate to the Tribunal that their representation of the Claimant was in any way limited. The Tribunal had every reason to believe and expect that MEL was representing the Claimant fully in the Claimant's proceedings.

4. A preliminary hearing took place on 13 December 2018 such hearing included an application by the Respondent that the Claimant's claim be struck out under Rule 37 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 Schedule 1. That application was successful and the Claimant's claims were struck out. The reasons are set out in my Judgment in full pursuant to that hearing.

5. As a result of my Judgment the Respondent indicated they wished to seek a Costs Order and/or Wasted Costs Order under Rules 76 and 80 respectively of the Employment Tribunals (Constitution and Rules of Procedure) Regulation 2013 Schedule 1.

6. As a result the matter came before me once again on 29 July 2019 for me to determine those costs applications. By this time MEL no longer represented the Claimant who is now unrepresented.

7. I had before me the Claimant and Counsel representing the Respondent, Miss Rokad who had been before me at the original hearing on 13 December 2018 and Counsel for MEL, Mr Davey.

8. An application for reconsideration of my Judgment on 13 December by the Claimant was unsuccessful and my decision in that respect was sent to the parties on 23 April 2019.

**Today's Hearing**

9. I am grateful to both Counsel for handing up chronologies and in Miss Rokad's case a skeleton which goes into considerable detail. I also heard submissions from both advocates and from the Claimant. I do not seek to repeat those here.

10. I had in front of me a witness statement of Kathy Durham who is employed as a case worker for MEL and latterly was the person with carriage of the Claimant's case although Ms Durham was not present before the Tribunal. Therefore, I made it clear at the outset that whilst I would read the contents of her witness statement limited weight could be attached to it.

**The application for a Costs Order against the Claimant**

11. Here the relevant Rule in the Employment Tribunal Rules is as follows:

> "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) have been conducted; or
>
> (b) any claim or response had no reasonable prospect of success;"

12. Miss Rokad for the Respondent sets out very eloquently in her skeleton argument that the Respondent pursues costs against the Claimant on the basis of two categories namely unreasonable conduct and bringing/pursuing unmeritorious cases where there is no reasonable prospect of success. She goes on to say that the Respondent argues that the Claimant or her former legal representatives MEL have brought and conducted proceedings in a manner which falls into both statutory criteria described above.

13. She directs me to a number of authorities and I am guided in my decision by a number of authorities. It is perhaps worth remembering that there is a culture in the Employment Tribunal which dictates that the award of costs is the exception rather than the rule. The case of **The Gee v Shell UK Limited [2013] IRLR 82** reminds me that Sedgley LJ said:

> "It is nevertheless a very important feature of the employment jurisdiction that it is designed to be accessible to ordinary people without the need of lawyers and that in sharp distinction for ordinary litigation in the United Kingdom losing does not ordinarily mean paying the other side's costs."

14. It is a sentiment often repeated in subsequent appeal decisions over the years. This means that people are entitled to come to an Employment Tribunal to say without fear of punishment in the form of a Costs Order "This is what happened to me, I think it is unfair, I think it is unreasonable, I think it is discrimination, what do you think?"

15. I am referred to the case of **Millan v Capsticks Solicitors LLP & Others UK EAT/0093/14/RN** where the then president of the EAT, Langstaff J set out a three stage exercise for Judges to employ when considering an award of costs. These are as follows:

    1. Has the putative paying party behaved in the manner prescribed by the Rules?

    2. If so, it must then exercise its discretion as to whether or not it is appropriate to make a Costs Order, (it may take into accountability to pay in making that decision).

    3. If it decides that a Costs Order should be made it must decide what amount should be paid or whether the manner should be referred for assessment (again the Tribunal may take into account the paying party's ability to pay).

16. It is worth mentioning that in these proceedings the Respondent seeks a Costs Order in the sum of £19,183.97 not including VAT.

17. In considering the behaviour of the Claimant and the Claimant's some time representative MEL I have duly considered the submissions made to me today by Miss Rokad, by the Claimant, by Mr Davey and I am aware of the contents of Kathy Durham's witness statement.

18. It should be remembered that the Claimant was originally unrepresented when she presented her claim in August.

19. On 19 September MEL wrote to the Tribunal indicating that it was instructed by the Claimant. I consider it significant in light of that which has been put forward on behalf of MEL that nothing in that letter indicated that MEL's representation of the Claimant was in any way restricted. There was no suggestion at that time that MEL could not or would not be prepared to appear at hearings and represent the Claimant.

20. This is subsequently a position adopted by MEL and in particular by Kathy Durham.

21. Ultimately as set out in my Judgment of 13 December the Claimant's claims in discrimination were struck out. It appears that her claims for unlawful deduction of wages had been satisfied. I do not propose to repeat the reasoning set out in my Judgment.

22. Neither the Claimant nor MEL attended on 13 December.

23. MEL had lodged an application for the hearing to be converted to a telephone hearing two days before on 11 December. This was bound to fail in light of the fact that the Tribunal had already made it perfectly clear that at the preliminary hearing on 13 December the Respondent's application for a strike out under Rule 37 lodged in October, would be

dealt with and that the matter would start at 10.00 a.m. and not 2.00 p.m. and be set down for three hours.

24. It is abundantly clear that MEL were aware that the Respondent intended to pursue a strike out on 13 December and that the Tribunal had indicated that that strike out would be heard that day and that the hearing had been moved to 10.00 a.m. or at least they should have been aware if they had taken the time, trouble and effort to look into the bundle which had been sent to them on 7 December by the Respondent or the various correspondence sent to them. In her untested witness statement Kathy Durham admits at paragraph 10 that she had the bundle. We know that that bundle included both the letter from the Tribunal dated 14 November indicating that the hearing would start at 10.00 a.m. and the application to strike out. Kathy Durham says she takes responsibility for not looking at that bundle. The application on 11 December was therefore wholly misconceived.

25. In that application to convert the hearing on 13 December to a telephone hearing Kathy Durham makes it perfectly clear that MEL have no intention of attending hearings on behalf of the Claimant. She says that MEL are restricted in the nature of their representation of the Claimant under the civil legal advice and under the legal help scheme. This is the first time that this had been revealed to the Tribunal. She goes on to say that they can only advise and represent the Claimant in telephone hearings but cannot attend in person. She cites the overriding objective as part of her application to convert.

26. It was clear therefore that there was never any intention for MEL to attend the hearing. Moreover, they waited until two days before the hearing to seek an entirely erroneous conversion of the preliminary hearing which was bound to fail. That behaviour was reprehensible and left the Claimant in a very difficult position.

27. Moreover there is a catalogue of failure on the part of MEL to deal timeously or at all with correspondence from those representing the Respondent. There also appears to be a failure to take notice of correspondence sent to them. Those representing the Respondent became not surprisingly entirely exasperated with this lack of response and began sending communications to as many individuals at MEL as they could ascertain were actually employed there. This included Steve Rochford, Sarah Marten and Lesley Rose. Despite this all that they received in response was a protestation from Lesley Rose that she was not involved. This was in response to, amongst other things, the sending of the bundle which included the Tribunal's letter of 14 November and the Respondent's application for strike out.

28. It is clear that MEL failed to engage properly with the Respondent's lawyers.

29. It is also entirely reprehensible that they should to go on the record for a Claimant without setting out the parameters of their representation. This only serves to mislead the Tribunal and their opponents. It is also disrespectful to the Tribunal.

30. Before me on 29 July the Claimant was understandably disgruntled and unhappy with the representation she had received. She said that she did not know that the hearing on 13 December had been converted to a 10.00 a.m. hearing. This flies in the face of Kathy Durham's untested witness statement. She says the Claimant was aware that she had to attend a preliminary hearing and that the Claimant was aware that MEL could not attend such hearings.

31. I do not accept that. I conclude that the Claimant was entitled to rely upon the fact that MEL were purportedly representing her in this matter. Kathy Durham was not in Tribunal to be tested on her evidence and I therefore accept the version of events put to me by the Claimant.

32. I therefore do conclude that MEL behaved unreasonably in these proceedings.

33. The Claimant's claims were struck out under Rule 37 on the grounds that they had no reasonable prospects of success.

34. I do not find that the Claimant behaved unreasonably. She initiated a claim and then engaged MEL to represent her. I do not know on what terms they agreed to represent her as no one has attended either hearing to be questioned. What is clear is that they certainly didn't inform the Tribunal of any limitation on their representation until the bound to fail application on 11 December. They failed to deal appropriately or at all with correspondence and failed to read the bundle sent to them thus failing to prepare or even assist the Claimant to prepare for the hearing on 13 December. That is all reprehensible.

35. The issue therefore is whether I exercise my discretion and make a Costs Order against the Claimant under Rule 76.

36. In this respect I am reminded that Mummery LJ in **Yerrakalva v Barnsley Metropolitan Borough Council [2012] ICR 420** emphasised that the Tribunal has a broad discretion and should avoid adopting an over analytical approach, for instance by dissecting the case in detail or attempting to compartmentalise the relevant conduct under separate headings such as nature, gravity and effect. The Tribunal should 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 has.

37. In the circumstances I do not propose to make a Costs Order against the Claimant. The Claimant was entitled to proceed with her claim. I have

accepted her version of events that she received poor representation from MEL. I do not consider that it would be right to punish the Claimant on this occasion.

38. Moreover it is highly questionable whether MEL constituted a "representative" under Rule 76(1) as they were, as we now know, not truly representing the Claimant in the true sense. Even if they did I would not be making an order against the Claimant for the reprehensible behaviour perpetrated by MEL.

39. The fact that the Claimant pursued a claim which was ultimately struck out under Rule 37 does not of itself mean that I have to exercise my discretion in favour of the Respondent.

40. Accordingly I make no Cost Order against the Claimant.

**Wasted Costs**

41. The Respondent also pursues a Wasted Costs Order against MEL. This is based on Rule 80 of the Tribunal Rules of Procedure.

> "80. **When a Wasted Costs Order may be made**
>
> (1) A Tribunal may make a Wasted Costs Order against a representative in favour of any party ("the Receiving Party") where that party has incurred costs –
>
> (a) as a result of any improper, unreasonable or negligent act or omission on the part of the representative, or
>
> (b) which in the light of any such act or omission occurring after they were incurred, the Tribunal considers it unreasonable to expect the Receiving Party to pay.
>
> Costs so incurred are described as "Wasted Costs".
>
> (2) "Representative" means a party's legal or other representative or any employee of such representative, but it does not include a representative who is not acting in pursuit of profit with regard to the proceedings. A person acting on a contingency or conditional fee arrangement is considered to be acting in pursuit of profit."

42. With respect to the Wasted Costs application and having heard from Mr Davey and read Kathy Durham's statement I am satisfied that I am not in a position to make a Wasted Costs Order against MEL. This is despite the criticisms I have levelled at them above for the way in which they behaved during this case and conducted themselves purportedly as the Claimant's representative. It is because I am satisfied that MEL were not acting in

pursuit of profit with regard to these proceedings. They are a registered charity and clearly have not acted in the pursuit of profit in this particular instance.

43. I am therefore not in a position to grant the Respondent's request to make a Wasted Costs Order.

44. For the reasons set out above the Respondent's applications for a Costs Order and a Wasted Costs Order fail and are dismissed.

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Employment Judge KJ Palmer

Date: 9 October 2019

Sent to the parties on: .....

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For the Tribunal Office