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EMPLOYMENT TRIBUNALS

Claimant: Mrs M Vasiliu
Respondent: Barclays Services Limited
Heard at: East London Hearing Centre
On: 20 January 2020
Before: Employment Judge Burgher
Members: Mrs L Conwell-Tillotson
Mrs B K Saund

Representation

Claimant: Did not attend
Respondent: Mr J Susskind (Counsel)

COSTS JUDGMENT

The Claimant is ordered to pay the Respondent the sum of £20,000 in respect of costs.

REASONS

1 The Respondent's counsel applied for costs pursuant to rule 75(1) and 76(1)(a) and 76(2) of the Employment Tribunal rules 2013 (ET rules).

2 Costs orders and preparation time orders:

75.—(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.

When a costs order or a preparation time order may or shall be made

76.—(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.

The amount of a costs order

78.—(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(23), 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 sub-paragraphs (b) to (e) of paragraph (1) may exceed £20,000.

3 The application was made on two grounds.

4 First that the Claimant's conduct in the proceedings has been vexatious disruptive and all unreasonable 76(1)(a) of the ET rules.

5 Second, that the Claimant has failed to comply with Tribunal orders causing unnecessary expense and anxiety to the Respondent, its staff and witnesses. It was also contended that the Claimant disrespected the Tribunal in respect of failure to comply with orders given.

6 The submissions were based on the Tribunal Judgment that was sent to the parties on 8 October 2019. The Claimant's claim was struck out on the basis of the default by the Claimant specified at paragraph 5 to 19 of the judgment and the conclusions stated

at paragraphs 27 to 30. Specifically the Tribunal struck out the Claimant's claims on the basis of non-compliance with Tribunal's orders and unreasonable conduct, the Tribunal found at paragraph 29 that the Claimant's failure to provide the relevant medical evidence, in breach of the Tribunal order, to justify the earlier postponement amounted to unreasonable and contumelious conduct.

7 Mr Susskind amplified his submissions regarding the Claimant's default by reference to the conduct of the Claimant during the hearing. He submitted that the Claimant has acted unreasonably and vexatiously in failing to comply with Tribunal directions relating to case management during the hearing and the Claimant's allegations that her treatment was comparable with how Jews were treated in the Nazi regime and in the same way as Soviet war crimes. Mr Susskind added that the Claimant was unprepared for trial, she had attended without a trial bundle and had not prepared questions for relevant witnesses. She was, he stated, simply trying it on respect of her claim.

8 The Claimant had failed to attend Tribunal to pursue her claim on 7 October 2019 without good reason and Mr Susskind maintained that her disengagement and non contact since then emphasised her unreasonable conduct.

9 Mr Susskind referred us to the meaning of vexatious given by Lord Bingham in case of *Attorney General v Baker* [2000] 1 FLR 759 at paragraph 19

"[T]he hallmark of a vexatious proceeding is ... that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceedings may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant, and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process"

10 Mr Susskind submitted that the Claimant has acted vexatiously. We accept Mr Susskind's submissions in this regard.

11 The Tribunal also has regard to the structured approach set out in the case of *Millan v Capsticks Solicitors LLP & Others* UKEAT/0093/14/RN where the then President of the EAT, Langstaff J, described the exercise to be undertaken by the Tribunal as a 3 stage exercise at paragraphs 52:

"There are thus three stages to the process of determining upon a costs order in a particular amount. First, the tribunal must be of the opinion that the paying party has behaved in a manner referred to in Rule 40(3); but if of that opinion, does not have to make a costs order. It has still to decide whether, as a second stage, it is "appropriate" to do so. In reaching that decision it may take account of the ability of the paying party to pay. Having decided that there should be a costs order in some amount, the third stage is to determine what that amount should be. Here, covered by Rule 41, the tribunal has the option of ordering the paying party to pay an amount to be determined by way of detailed assessment in a county court."

12 The Tribunal therefore considered the following issues:

12.1 Has the putative paying party behaved in the manner proscribed by the rules?

12.2 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 account ability to pay in making that decision).

12.3. If it decides that a costs order should be made, it must decide what amount should be paid or whether the matter should be referred for assessment, (again the Tribunal may take into account the paying party's ability to pay).

13 In respect of issue 12.1 we accept Mr Susskind's submissions and having regard to the Tribunal judgment striking out the Claimant's claim we conclude that the Claimant has acted contrary to both rules 76(1) (a) and 76(2) of the ET Rules for costs to be engaged.

14 In respect of issue 12.2, when considering whether to exercise our discretion to award costs we had no representations from the Claimant or detailed information on her means to pay any costs. However, Mr Susskind helpfully pointed out that the Claimant had stated in an email of 4 October 2019 that

"my finances pretty much run dry and despite my financial efforts to be present in London next week I cannot financially manage this at the moment in a safe manner"

15 Save for this indication regarding her finances we have no further information to make an assessment on the Claimant's ability to pay.

16 The Claimant was made aware of the costs hearing and has not communicated with the Tribunal or the Respondent to make any representations about costs or her means.

17 When deciding whether to exercise our discretion to consider costs we have taken into account the indication that the Claimant may be of limited means and balance this against our conclusions that the Claimant has acted in a manner prescribed by the rules by acting in an unreasonable and contumelious manner, that she has failed to comply with Tribunal orders and that she was made aware of the potential cost consequences of failing to comply. We conclude that it is appropriate to exercise our discretion to award costs.

18 When considering the amount of costs, we considered whether it was appropriate to refer the matter for assessment or for the matter to be considered with summarily.

19 We were referred to the case of Yerrakalva v Barnsley Borough Council [2012] ICR 420, CA where it was held that the purpose of a costs award is to compensate a party for the costs that are reasonably and necessarily incurred.

20 Mr Susskind submitted that the Tribunal should award the Respondent its full costs of nearly £70,000 including the costs of attendance at the costs hearing. We were referred to the Respondent's cost schedule that supported this position. Mr Susskind forcefully submitted that the matter should be referred to for assessment pursuant to rule 78(2) ET rules and 100% of the Respondent's costs ordered.

21 Mr Susskind submitted that the Claimant was claiming over £250,000 as a remedy and the costs incurred where proportionate to the claims. The Claimant had made over 100 allegations that required there to be a heavy trial bundle and extensive preparation for hearing with numerous witnesses and as such the costs were reasonable and necessary to be incurred.

22 Mr Susskind contended that to consider the matter summarily would mean that the Respondent would receive less than a third of its costs and it would be an unfair exercise of the Tribunal's discretion not to give the Respondent more than a £20,000 which was less than a third of the costs incurred, especially in view of the seriousness of the Claimant's conduct and breach of Tribunal order and the assertion that the Respondent has behaved impeccably. He asserted that reference a cost judge could be done quickly and easily as the preparatory work had already been undertaken.

23 When considering whether to refer to an assessment or to enable summary assessment we concluded that it was appropriate to exercise or discretion for summary assessment. The Claimant has given an indication, albeit by one sentence, that she has financial constraints, she is not in the country for any further representations or enforcement to be immediately forthcoming and the assignment of a further hearing before a Cost Judge was not considered in accordance with the overriding objective of saving further expense, both for the Respondent and public funds of having another Tribunal hearing for detailed assessment.

24 We therefore concluded that summary assessment is appropriate. We were taken through the Respondent's costs incurred and we are satisfied that £63,831.73 was billed excluding the additional sums incurred for the costs hearing.

25 The Claimant was seeking a large sum from the Respondent for her extensive claims and the Respondent was required to take reasonable and proportionate steps to defend them. Notwithstanding the indication that the Claimant has limited means we concluded that she ought to have prepared for, reviewed and focused her and attended the Tribunal for them to be determined. We assess the proportion of her default for her unreasonable conduct of the proceedings and breach of the Tribunal orders put the Respondent to further expense that it would not otherwise have incurred had the Claimant acted reasonably or complied with the orders.

26 In these circumstances we assess that the Claimant should be ordered to pay £20,000 as a contribution to the costs. Such costs were reasonably and necessarily incurred in defending the Claimant's numerous and wide ranging claims that were subsequently struck out due to her conduct. The amount of the cost award balances the need to properly compensate the Respondent for its costs whilst having regard to the indication that the Claimant may be unable to pay. The sum is therefore far less than would have otherwise been ordered had the Tribunal been satisfied that there was no issue regarding the Claimant's means and ability to pay.

After the hearing

27 On 21st of January 2020, after the cost judgement had been given, the claimant emailed the tribunal and stated that she had suffered an accident on the 19th at around 7pm and was in emergency hospital with her "right feet immobilized". The Claimant objected to the hearing taking place in her absence without representation and stated that

it was physically impossible for her to attend. She stated that there would be many weeks of immobilisation ahead and months of medical procedures to follow for recovery.

28 No medical evidence was provided and no prior written representations objecting to costs being awarded or any indication that she was seeking to engage in the process prior to this email. The hearing therefore took place in the Claimant's absence and the cost judgment stands.

Employment Judge Burgher

7 February 2020