



THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON SOUTH

BEFORE: EMPLOYMENT JUDGE J NASH (sitting alone)

BETWEEN:

Claimant MRS A VETHANAYAGAM

and

Respondent QUO VADIS TRUST

ON: 25 February 2020

APPEARANCES:

For the Claimant: Mr Neckles, Lay Representative

For the Respondent: Mr H Lewis-Nunn, Counsel

A costs order having been sent to the parties and written reasons having been requested, the following reasons are provided:

REASONS

The Hearing

1. This was an application for a costs order and a preparation time order, on behalf of the Respondent against the Claimant following a strike out of the claim. The Respondent's representative confirmed that there was no application in respect of a wasted costs order.
2. The Tribunal heard no oral evidence but had sight of written submissions from the Respondent's representative, to which he spoke, and he answered questions from the Tribunal.

3. For the Claimant, Mr Neckles had not provided written submissions but addressed the Tribunal and answered questions from the Tribunal.

The Law

4. The basis on which the Respondent sought its costs is that, pursuant to rule 75 of the 2013 Tribunal Rules of Procedure, the Claimant had brought or conducted the proceedings in an unreasonable manner.
5. Rule 75 provides as follows: –

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;...

6. The Tribunal reminded itself that the award of costs in the Employment Tribunal is the exception rather than the rule as set out in the Court of Appeal in the case of *Yerrakalva v Barnsley Metropolitan Borough Council and another 2012 ICR 420 CA*. In the normal course of events in the Tribunal, costs do not follow the event. The fact that a party has been unsuccessful does not necessarily mean that a costs order will be made against them.
7. When a Tribunal considers whether to award costs, it must bear in mind that the purpose of a costs order is compensation, rather than punishment of an unsuccessful party.

Should a Costs of Preparation Time Order Be Made?

8. The tribunal went on to consider whether the claimant had brought and/or conducted proceedings in an unreasonable manner.
9. The Tribunal noted that the Claimant took advice from persons who describe themselves as providing experienced professional help, although not legally qualified persons.
10. In respect of the conduct of the Claimant, the Tribunal agreed with submission of the Claimant's representative that there should be no order in respect of costs up to the date of the case management hearing. Claimants are permitted to bring claims and one of the purposes of a preliminary hearing is to encourage parties to withdraw claims or defences, or parts of claims or defences, in which they have less faith,

sometimes as a result of the tribunal's case management. Were costs to be awarded in such circumstances, it could well have the undesirable and inadvertent consequence of parties continuing with arguments in which they have little or no faith, in the hope that they might avoid a costs order later on.

11. The one aspect of the conduct prior to the case management hearing which might be considered less than constructive was the claimant's representative informing the respondent prior to the hearing that the claimant would not receive a fair hearing at the hearing centre, without providing any reason for this. However, this was a minor matter and it did not appear to have led to material costs for the respondent. The hearing went ahead as listed and both parties were able to attend and make representations.
12. However, in view of the Tribunal, the circumstances were materially different following the case management hearing. From this point on, the Claimant had had the advantage of a hearing in front of a Judge who made clear directions to prepare the case for the final hearing. The Claimant also had the advantage of a clear and detailed case management order.
13. Following the preliminary hearing, the claimant failed to provide a schedule of loss in time. The Claimant, or her representative, sought to rely on the fact that the Tribunal order had not yet been received before the return date. This is not a relevant factor, as any experienced representative would know. It is standard procedure when making a case management order, for the Tribunal to inform parties that return dates must be complied with even if, due to regrettable delays, the hard copy of the order has not yet been received.
14. Further, the Respondent sought to assist the Claimant, including by providing a schedule of loss template. However, the respondent encountered further delays. There was further non-compliance on the claimant's part, for instance, in respect of the annual leave claim; the respondent sought further particulars because the complaint set out in the ET1 was notably difficult to understand. Further, the Respondent made an uncontested allegation that, when seeking to have the claimant comply with directions, the Claimant's representative told the Respondent's representative that it would not accept Tribunal directions. All of these matters resulted in the respondent incurring unnecessary costs.
15. In respect of disclosure, there were further delays requiring the respondent to incur further costs. To illustrate, the claimant failed to make disclosure, contrary to Tribunal directions, on the basis that the Respondent had not replied to the claimant's specific disclosure request. This was contrary to the Tribunal's instructions that the parties should

- wait until receiving each other's standard disclosure, and then make specific disclosure requests in respect of anything further.
16. The final failure and most serious failure by the Claimant was in respect of witness statements. As per the case management order, the Respondent was ready to exchange on 30 November 2018. However, the Claimant failed to exchange. The Respondent finally applied for an unless order on 14 March 2019.
 17. The Tribunal wrote to the claimant on 7 June 2019 warning her that if she failed to respond within 7 days, an unless order would be made. By this point, the Claimant had had well over five months in which to comply with the case management order, to which she had not objected at the hearing.
 18. Although the Tribunal did not make an unless order, the effect of the tribunal's letter was that the claimant was well aware, having been told in succinct and clear terms, that she must comply with Tribunal's orders. The Claimant's representative acknowledged the tribunal's letter, showing that it had been received.
 19. The only response from the claimant was on 18 June when her representative sent a letter to the Respondent, who forwarded it to the Tribunal. Unfortunately, there was no copy of this letter on the Tribunal file and it is unclear whether the claimant had sent this letter to the tribunal. Nevertheless, the letter was received by the Tribunal, albeit after the Tribunal's deadline on 14 June.
 20. The claimant's representative's letter was not reasonable. The representative stated that he did not know what orders he had failed to comply with. The case management order was in clear terms and any supposed lack of understanding had not been raised with the Tribunal previously. The Claimant and her representative could have been under no illusion that they had not prepared witness statements, as they were required to do. Further, the representative's letter falsely stated that the Claimant had complied with all aspects of the Employment Tribunal order.
 21. The claim was then struck out by the Tribunal on 27 June and the order was sent to the parties on 12 July. The Claimant then changed her representative to her current representative on 18 July. He applied to postpone a non-existent hearing on 22 July. On 26 July a request was made on behalf of the claimant to extend time to reply to the letter of 7 June, despite the fact that the deadline had long passed.
 22. During this pattern of conduct, the Respondent made frequent and express costs warnings in correspondence with the claimant's representative.

23. Further, the claimant's conduct amounted in effect to a failure to actively pursue her case, as evidenced by a five month plus failure to provide witness statements and then by making further unreasonable applications after the case had been struck out. The claimant then failed in any material way to cooperate with the respondent in its costs application, necessitating considerable preparation and the respondent's attendance at a cost hearing. In the view of the Tribunal, the claimant should have been aware that it was more than likely that her conduct of proceedings would be considered unreasonable, and a costs or preparation time order would be made against her.
24. Accordingly, the Tribunal finds that the Claimant's conduct following the case management hearing up to and including today's hearing was unreasonable.

The Amount of a Costs Order

25. In respect of the amount to be awarded for costs, the Tribunal's jurisdiction is limited by rule 75(3) whereby it may not make a costs and a preparation order in favour of the same party in the same proceedings. The Tribunal informed the Respondent it might, in effect, choose which of the two orders it would be prepared to make that it would prefer. To this end, the Tribunal considered the amount of a putative costs order and a putative preparation time.
26. Quantum awarded in costs or preparation orders should normally reflect the Tribunal's assessment of both what is reasonable and proportionate, with any doubt resolved in favour of the paying party. This is the standard and usual basis for costs assessment in the Courts as well as in the Tribunals.
27. A preparation time order under rule 79 requires a party to make a payment to another party in respect of that party's preparation time. Assessment must be based on the information provided by the receiving party and the Tribunal's own assessment of reasonableness.
28. Although the Respondent provided only limited evidence of the breakdown of costs up to November 2018, the total of 17.4 hours was far from implausible to run an Employment Tribunal case from the preliminary hearing almost to the door of the final hearing. The amount of time as shown in the bundle was significantly inflated by the Claimant's ongoing and unreasonable failures and therefore the Tribunal would, if requested, make a preparation time order of 17.4 hours.
29. The rate applied for by the respondent of £39.00 per hour is less even than legal aid rates and it is considerably less than the Respondent paid to its representatives. Thus, if a preparation time order would be in the sum of £678.60 (being 17.4 hours x £39.00 per hour).

30. The tribunal then turned to a putative costs order. Counsel's fees were £1,250 for preparation and representation at this costs hearing. In the view of the Tribunal, this was a reasonable sum. Counsel provided very lengthy and detailed written submissions, which were entirely caused by the very long list of failures by the Claimant and her representatives. These failures amounted at times to obstructive behaviour and to making statements to the tribunal which, quite simply, were not true. Counsel's rates appeared modest in light of his experience and the complexity of the case.
31. Accordingly, a costs award of £1250 was considered reasonable. Counsel does not charge VAT and the Respondent does not have any insurance against the costs it has incurred.
32. The respondent invited the tribunal to make a costs order as opposed to a preparation order. In light of the significant failings on behalf of the claimant, the tribunal stated that it was minded to grant this request, subject to rule 41(2).

The Paying Party's Ability to Pay

33. Rule 41(2) provides that the Tribunal or Judge may have regard to the paying party's ability to pay when considering whether to make a costs order. The claimant confirmed that she wished the tribunal to take her ability to pay into account.
34. The claimant has provided little evidence of her means. Essentially, the Claimant asserted that she had a wage of £1,204.62 per month and her outgoings amounted to more than this. However, she provided no bank statements and no payslips. There was an assertion of a marital break-up over the last six months and it was said that there were savings of £1,000.00. According to documents in the bundle, the Claimant was joint owner with her estranged husband of a property. The mortgage payments per month were low, indicating it was likely that there was some if not significant equity in the property. However, it was unclear as to what access the Claimant might have to this equity, as it was jointly owned with her estranged husband.

35. The tribunal was limited in its ability to have regard to the claimant's ability to pay due to lack of evidence. Nevertheless, to avoid possible immediate hardship to the claimant, and to give her ample time, she will be permitted 3 months from the date that the order is sent to the parties to pay.

Employment Judge Nash

Date: 1 April 2020