Case Number: 3201050/2018

EMPLOYMENT TRIBUNALS

Claimant: **Ms S Sineinikova**

Respondent: **ActivTrades Plc**

Heard at: **East London Hearing Centre**

On: **4 & 5 March, 20 April and 22 May 2020**

Before: **Employment Judge Ross**

Members: **Ms L Conwell-Tillotson**
Mr M Rowe

Representation

Claimant: In Person
Respondent: Ms. A. Mayhew, Counsel

JUDGMENT ON COSTS

The judgment of the Tribunal is that:-

1. **The Respondent has conducted these proceedings unreasonably in respect of the following complaints:**

   1.1. **the defence to the complaints of unfair dismissal under section 98 Employment Rights Act 1996; and**
   1.2. **the defences to the complaints found proved at 4.1, 4.2, 4.3, 4.4, 4.5, 4.6, 4.7 and 5 of the Judgment promulgated on 10 September 2019 under section 47B Employment Rights Act 1996 and section 27 Equality Act 2010.**

2. **The Respondent's defence had no reasonable prospect of success in respect of the complaints identified at 1.1 and 1.2 above.**

3. **It is just and appropriate that a costs order be made.**

4. **The Respondent shall pay to the Claimant 65% of her legal costs reasonably incurred up to 24 June 2019 in respect of this Claim.**

5. The Claimant's application for the Respondent to pay her share of the fees of the single joint expert is refused.

REASONS

The Claimant's Costs application

1. By email letter sent on 20 February 2020, the Claimant made a costs application, having first attempted to agree costs with the Respondent.

2. The Claimant produced invoices from solicitors who assisted her from time to time. The sum claimed in the application was £73,115 including VAT. At the hearing of the application on 5 March 2020, the Claimant also claimed the costs shown in the invoice marked C2 (for the period 5 February to 3 March 2020) of £1632. In addition, the Claimant claimed her share of the cost of instructing the joint expert, being £11,858 including VAT.

The law on the award of costs in the Employment Tribunal

3. In the Employment Tribunal, costs orders are the exception rather than the rule. In most cases the employment tribunal does not make any order for costs. If it does, it must act within rules that expressly confine the Employment Tribunal's power to the specified circumstances set out within Rule 76: Yerrakalva v Barnsley Metropolitan Borough Council at paragraph 7 per Mummery LJ.

4. Rule 76 of the Employment Tribunal Rules of Procedure 2013 provides that a costs or time preparation order may be made where a tribunal 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.

5. The procedure for making a costs application is set out at rule 77. Rule 78 provides that the Tribunal 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;…;"

6. In Millan v Capsticks Solicitors LLP & Others UKEAT/0093/14/RN, the President of the EAT, then Langstaff J, described the exercise to be undertaken by the Tribunal as a three stage exercise, which may be paraphrased as follows:

   6.1. Has the putative paying party behaved in the manner proscribed by the rules?
   6.2. If so, it must then exercise its discretion as to whether or not it is appropriate to make a costs order
   6.3. 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.

7. In McPherson v BNP Paribas [2004] ICR 1398, it was suggested that in deciding whether to make an order for costs, an Employment Tribunal should take into account the "nature, gravity and effect" of the putative paying party's unreasonable conduct.

8. In Yerrakalva v Barnsley Metropolitan Borough Council [2012] ICR 420 (paragraphs 39 – 41), however, it was emphasised that the tribunal has a broad discretion, and it 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 words of the rule should be followed and the tribunal should

   "look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct … in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had".

9. The correct approach to costs in the Employment Tribunal was considered again by the Court of Appeal in Sud v London Borough of Ealing [2013] EWCA Civ 140. From paragraph 67, it adopted and emphasised the importance of the Yerrakalva approach. The words of the Rule should be followed and the Tribunal needs to look at the whole picture of what had happened in the case, then to ask whether there has been unreasonable conduct by the party. As was made clear in Yerrakalva, although causation is undoubtedly a relevant factor it is not necessary for the Tribunal to determine whether or not there was a precise cause or link between the unreasonable conduct in question and a specific cost being claimed. The circumstances do not need to be separated into sections, each of which in turn forms the subject of individual analysis, because this risks losing sight of the totality of the relevant circumstances.

10. Paragraph 14 of the Presidential Guidance Note on costs provides:

    "The circumstances described [in rule 76] require a Tribunal to consider first whether the criteria for an order are met. Each case will turn on its own facts. Examples from decided cases include that it could be unreasonable where a party has based the claim or defence on something which is untrue. That is not the same as something which they have simply failed to prove. Nor does it mean something they reasonably misunderstood. Abusive or disruptive conduct would include insulting the other party or its representative or sending numerous unnecessary e-mails."

11. There is no rule of law that the discretion to award costs may only be exercised where deliberately dishonest conduct is shown, although if there is such conduct then a costs order may be more likely: see Brooks v Nottingham University NHS Trust [2018] UKEAT 0246/18 at paragraph 47 per Choudhury J (upholding an award of costs of £170,000 against a Claimant where the Tribunal did not find dishonest conduct).

12. The fact that a party may have given false evidence is not reason on its own to automatically order costs against the party. It is necessary to look at the whole picture of what happened in a case and ask whether there has been unreasonable conduct by the party: see Kapoor v Governing Body of Barnhill School UKEAT/0352/13 at paragraph 15 per Singh J.

13. In Yerrakalva, Mummery LJ was keen to emphasise that no gloss should be added by case-law to the powers conferred by the Rules.

14. There is nothing in the wording of the Rules to limit the costs that may be awarded to costs incurred at a particular stage of the proceedings or indeed to costs incurred after they have begun: Sunava v Martin [2017] UKEAT/0174/17 at paragraph 19, per Kerr J.

15. Rule 84 provides that the Tribunal may have regard to the paying party's ability to pay. It was not suggested that the Respondent in this case did not have the ability to pay an award of costs.

Submissions

16. The parties made oral submissions on the issue of costs. The Claimant relied on 54 findings of fact in the Judgment on Liability. She argued that, in effect, the Tribunal had found that there was a conspiracy between directors and employees of the Respondent to deliberately mislead the Tribunal, and thus the defence to the Claim had no reasonable prospect of success. In the alternative, the Respondent had behaved unreasonably, because its case had been based on lies.

17. Ms. Mayhew argued that the costs jurisdiction was compensatory, not punitive: the question for the Tribunal was which aspects of conducting the proceedings or defending had led to proceedings and costs. The Respondent did not concede that the threshold for awarding costs had been met. The Tribunal had to focus on whether any conduct was unreasonable, and, if so, which. Ms. Mayhew directed the Tribunal back to the original list of issues, explaining that the Respondent had succeeded in defending a number of issues.

18. Ms. Mayhew further argued that the expert's fees were not recoverable; the Respondent had had to take the points on remedy which it had done. The sums claimed were excessive and outside the scope of what could be awarded; so the Respondent could not attempt to settle the Claim.

Conclusions on the costs application

(1) Had the Respondent behaved in the manner proscribed by the rules?

19. In determining whether a party acted unreasonably, the Tribunal considered that it should look at the whole picture of what happened in the case and to ask whether there had been unreasonable conduct, to identify the unreasonable conduct, and what effects it had. The test is not so high as to require that the conduct was vexatious or abusive.

20. The Tribunal found that the Respondent had acted unreasonably in defence of this Claim. We concluded as follows. We use the terms "nature", "gravity" and "effect" as tools, to guide us in this exercise, although in reality, the line between the nature and gravity of the conduct is often a blurred one.

Nature & gravity of the Respondent's conduct

21. The nature and the gravity of the Respondent's conduct demonstrated unreasonable conduct during these proceedings. It is not necessary for the Tribunal to outline each and every piece of unreasonable conduct by the Respondent, but the following matters demonstrate unreasonable conduct within these proceedings which we found to be particularly grave.

22. In respect of the complaint of unfair dismissal under section 98 ERA, a decision to dismiss had been pre-determined before any proper investigation. The Tribunal found that the Respondent engaged in an alleged disciplinary process which was a sham.

23. It was unreasonable conduct for the Respondent to attempt to defend a sham process as being fair, and attempt to defend the complaint of unfair dismissal as a whole, with false evidence at the liability hearing which sought to deny that a decision to remove the Claimant from her post had been made before the Claimant's constructive dismissal. The Tribunal explained in its conclusions at paragraphs 9, 188 and 304 to 308 that the Respondent engaged in a sham disciplinary process and that it had pre-determined a decision to dismiss.

24. The Tribunal found as a fact that the Respondent used the grievance investigation in a retrospective attempt to attack the credibility of the Claimant as a Compliance professional. The grievance process, started by the Claimant with an honest belief, was used by the Respondent as a tool against the Claimant both because of the protected disclosures and to deter her from enforcing her employment rights against the Respondent: see paragraph 65 and 149 Judgment and Reasons on liability. It was unreasonable conduct for the Respondent to attempt to rely on the alleged findings of the grievance investigation to undermine the Claimant's credibility and her case in these proceedings, when the report had been tainted by Mr. Pusco's view of the Claimant; and there was no basis in fact for key conclusions of the investigation report.

25. Moreover, in respect of the recruitment of Mr. Gordon, the Tribunal found that in his evidence, Mr. Gee had sought to conceal the true nature of his engagement: see paragraph 149. He knew that he was not an independent grievance officer, but sought to paint him as such. This was evidence that Mr Gee knew to be untrue.

26. The Respondent had wrongly retained sensitive personal information relating to the Claimant. This data was retained throughout the liability proceedings. The Tribunal

found that on this issue, the Respondent was guilty of various strands of unreasonable conduct within these proceedings:

26.1. Paragraph 65 of the ET3 was misleading and an attempt to conceal the true position (see the conclusion at paragraph 400 of the Reasons on liability).

26.2. This victimisation/section 47B ERA complaint was resisted on the basis that there was lawful justification for retention of the data. The Tribunal found that the Respondent had no genuine belief in the alleged justification for retention: see paragraphs 406-420 of the Reasons on liability for our conclusions.

26.3. The Tribunal found that there was no basis in fact for any of the potential legal claims that the Respondent had threatened the Claimant with; and, therefore, there was no justification for retaining her personal data for this alleged reason: see paragraph 415 of the Reasons.

26.4. The sensitive personal data was retained for an ulterior motive, to deter the Claimant from enforcing her legal rights, when it must have been apparent to the Respondent that it had no lawful right to hold onto such information, particularly after the finding of the Information Commissioner and the instruction to the Respondent to delete all data relating to the Claimant's family life. This data was wrongly retained throughout the liability proceedings.

27. Several of the paragraphs in the Judgment and Reasons on liability identified that Respondent witnesses had not told the truth on oath or affirmation. In particular, paragraphs 9, 35, 37, 58, 65, 83, 139, 149, 158, 169, 175, and 211 of the Reasons on liability demonstrate either that a witness failed to give credible evidence and/or that they relied on a document or allegation that they knew contained false information. The fact that the Respondent's witnesses gave (or relied on) false evidence did not automatically lead the Tribunal to conclude that the conduct of the Respondent had not been reasonable, but we found that it was a matter that carried substantial weight in establishing both that the conduct of the Respondent had been unreasonable and that the defence to several of the complaints had no reasonable prospect of success.

28. The Tribunal concluded that there was substance in the Claimant's argument that the Respondent's case in respect of most of the complaints after the Claimant raised her grievance in December 2017 was built on a series of untruths, following a co-ordinated plan to discredit the Claimant within these proceedings. This is supported by numerous findings of fact. In particular, serious yet false allegations of misconduct were made against the Claimant, including to the FCA. The Respondent persisted in these allegations within these proceedings, knowing that they were not true. The key decision-maker in this plan was Mr. Pusco, but we heard no evidence from him to explain the steps taken against the Claimant.

29. The Tribunal accepted that the Respondent was quite entitled to defend the Claim robustly, including by seeking to damage the Claimant's credibility. However, the conduct of the Respondent went well beyond defending the Claim; it included dishonest conduct, which aimed to mislead the Tribunal, away from the true facts,

and it aimed to deter the Claimant from pursuing her legal rights by alleging false matters which risked grave professional injury to the Claimant. In the context of a Claimant who is a Compliance professional, in a controlled function regulated by the FCA, the Tribunal found the unreasonable conduct in this case to be towards the more serious end of the range in terms of gravity.

30. The defence to the complaint of unfair dismissal under section 98 ERA, and to certain complaints of victimisation under section 27 EQA and under section 47B ERA, had no reasonable prospect of success. We repeat the factors set out above where relevant. In particular:

    30.1. The Respondent's defence to the complaints of victimisation (both under section 27 EQA and section 47B ERA) in respect of matters after she raised her grievance in December 2017 were based on alleged facts that were untrue or on alleged legal justification for which there was never any basis in fact.

    30.2. The Respondent had pre-determined a decision to dismiss the Claimant, without any proper investigation and without any reasonable grounds to dismiss.

(2) Exercise of the discretion; the effect of the conduct

31. The Tribunal concluded that the unreasonable conduct of the Respondent, and its decision to defend the successful complaints in the absence of any reasonable prospect of success, led to the Claimant incurring substantial legal costs.

32. We heard no evidence and no argument which might suggest that the Tribunal should not exercise its discretion once we had found the threshold reached.

33. We considered the serious nature of the unreasonable conduct, and its effect on the Claimant in terms of increasing the number of factual and legal issues for determination. This caused substantial increase to her legal costs of preparation for this hearing.

34. Moreover, this was not a case where the Respondent lost on simple disputes of fact. Here, the Respondent pursued a plan against the Claimant, which included a deliberate attempt to mislead the Employment Tribunal by its pleaded case and its evidence from the outset. This was in respect of multiple, central, allegations made by the Claimant in these proceedings, such as that a decision to dismiss her had been pre-determined, that the Respondent had misled the FCA, and that the Respondent had no right to continue to hold sensitive personal data after her employment. In those circumstances, the Claimant's costs were inevitably going to be increased in a substantial way. In the experience of this Tribunal, it is far from simple to gather sufficient evidence, and to unpick the opponent's evidence, so as to demonstrate a concerted plan against an employee.

35. The Tribunal noted, in particular, that the post-employment acts of victimisation and detriment added substantially to the issues and therefore the legal costs of the Claimant. For example, the Respondent's refusal to comply with data protection legislation and its refusal to comply with the decision of the Information

Commissioner added to the length and complexity of the case. There was absolutely no need and no legitimate reason for the Respondent to engage in the detriments at 4.3 to 4.7 of the Judgment on Liability.

36. It is important to note that the Respondent's witness evidence was not rejected because there was mere misperception, or a failure to recall events. As the Tribunal has explained in Paragraph 8 and elsewhere of our Judgment and Reasons, the Respondent's witnesses gave certain evidence that was not credible. In this case, the Respondent aimed to conceal from the Tribunal the true facts and the real reason for the detriments, which the Claimant did succeed in proving were acts of victimisation or section 47B ERA detriments. Inevitably, this added to the Claimant's costs of proving her claim.

(3) Quantum of the costs award

37. The Tribunal did not accept that it needed to correlate each piece of unreasonable conduct with a particular element of costs or section of the case. The approach to be adopted was that set out in Yerrakalva.

38. Ms. Mayhew's complaint that there was no Schedule of Costs was not an attractive one. The Employment Tribunal Rules of Procedure 2013 do not make the preparation of a schedule of costs a pre-condition of a successful costs application. This is understandable; litigants in person (and several representatives) would be unlikely to understand what a schedule of costs required. In any event, each invoice had (in general) a list of the work done in respect of the invoice.

39. However, the Tribunal accepted the Respondent's general point that the list of issues included a number of different complaints and issues and the Claimant had not succeeded on several of these. In particular:

    39.1. The complaints of direct sex discrimination did not succeed. These involved consideration of a number of factual issues before the Claimant's grievance was submitted on 15 December 2017.

    39.2. The complaint of automatic unfair dismissal did not succeed (although the Respondent failed to establish any potentially fair reason for dismissal, so it was unlikely that more than trivial costs had been expended on this issue alone).

    39.3. Certain alleged disclosures were found not to be protected disclosures.

    39.4. Allegations of detriment caused by public interest disclosures or protected disclosures did not succeed.

    39.5. The Claimant had not succeeded in proving aspects of her revised Schedule of Loss, particularly stigma loss.

40. The Tribunal accepted the Respondent's argument that, if the threshold conditions were met, it should only be ordered to pay a proportion of the costs. This is because the Respondent was entitled to defend those parts of the Claim which did not succeed, and those parts of the Claim had increased costs.

41. Reminding itself that the jurisdiction to award costs was compensatory, and standing back to look at the case as a whole, the Tribunal concluded that, on a broad brush approach and to ensure that just compensation was awarded, it was appropriate for the Respondent to pay 65% of the Claimant's legal costs incurred by the Claim, limited to the date on which the liability hearing concluded, 24 June 2019 (24 June 2019 being the final day of the hearing, which was our in chambers discussion). There was no real argument by, or evidence from, the Claimant that the Respondent had acted unreasonably at the remedy stage of the hearing.

42. In determining the figure of 65% of the costs up to the end of the liability hearing, we decided that those parts of the Claim which succeeded were very substantial in terms of the amount of evidence that had to be heard to determine them; for example, primary facts had to be found from which a plan to remove the Claimant was inferred. The Tribunal concluded that those parts of the Claim which succeeded must, inevitably, have involved the bulk of the legal costs in terms of advice and/or preparation.

43. Moreover, the Claimant's costs were likely to have been exacerbated because of the deliberate actions of the Respondent in attempting to create a false narrative of events, which had to be responded to.

44. Further, by the Respondent alleging legal justification for certain acts and omissions, where it had no grounds for believing that any justification existed, it became necessary for the Claimant to respond to these parts of the Respondent's case to show why no justification existed.

Costs of the single joint expert

45. The Tribunal accepted Ms. Mayhew's submissions that the Claimant could not recover her share of the costs of instructing the single joint expert, Mr. Baxter, whether to prepare his report or to respond to her questions. This was not part of the legal costs of the Claim.

46. In any event, if we are wrong about this, this item of costs arose because of an issue related to remedy (stigma loss), which the Respondent was successful in defending. Accordingly, it would not be just to compensate the Claimant by ordering the Respondent to pay the cost of this item.

<u>Case management: detailed assessment of costs</u>

47. The precise amount of the costs order as to what costs are proportionate and have been reasonably incurred will require detailed assessment before a Judge trained to assess costs.

48. There will be a hearing to consider the detailed assessment of the Claimant's costs on the first available date after 13 July 2020, with a time estimate of one day. There is no apparent reason why this hearing cannot take place remotely, by telephone. Case management orders in respect of this assessment of costs are contained in a separate order.

49. The Claimant shall serve a schedule of costs, identifying clearly the dates upon which work was done, the nature of the work done and by whom it was done, on or before 29 June 2020. The Respondent shall provide any response by way of a counter-schedule with points of dispute presented on or before 13 July 2020. The parties should provide dates to avoid within 14 days of promulgation of this Judgment.

Employment Judge A. Ross
Date: 8 June 2020