EMPLOYMENT TRIBUNALS

Claimant: Mr S Williams

Respondent: Green Willow Funerals Limited

On: 9 November 2020 (in chambers)

Before: Employment Judge S Jenkins
Mr W Davies
Ms J Southall

JUDGMENT

The Respondent's application for a costs order succeeds and the Claimant is ordered to pay the Respondent the sum of £450.00 by way of costs.

REASONS

Background

1. The Claimant brought claims of ordinary unfair dismissal pursuant to section 94 Employment Rights Act 1996 ("ERA"), unfair dismissal on the ground of having made a protected disclosure pursuant to section 103A ERA, harassment on the ground of sex pursuant to section 26 of the Equality Act 2010, and breach of contract in respect of notice.

2. The hearing took place on 25, 28, 29 and 30 October 2019, at the conclusion of which the claims were dismissed. The Judgment confirming that was sent to the parties on 31 October 2019 and, following that, the Respondent made a request for written reasons, which were sent to the parties on 31 December 2019.

3. The Respondent made an application for costs, pursuant to Rule 74 of the Employment Tribunals Rules of Procedure ("Rules"), by letter dated 12 November 2019. The application was made, pursuant to Rule 76(1)(a), on the basis that it was asserted that the Claimant had acted vexatiously, abusively, disruptively or otherwise unreasonably in bringing the proceedings and in the way the proceedings had been conducted by him. The Respondent asserted that the Claimant had been motivated, since the commencement of proceedings, by a vexatious desire to maximise

disruption to the Respondent and cause harm to its reputation. In the letter, the Respondent's representative confirmed that the Respondent did not seek costs in relation to any time or expense incurred in relation to the complaint of sexual harassment, but sought costs incurred in relation to the other claims.

Law

4. Rule 76 provides as follows:

> "*(1) A Tribunal may make a costs order…, and shall consider whether to do so, where it considers that-*
>
> *(a) a party…has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of proceedings (or part) or the way that the proceedings (or part) have been conducted; or*
>
> *(b) any claim or part had no reasonable prospect of success.*"

5. Rule 77 provides that a party "*may apply for a costs order…at any stage up to 28 days after the date on which the judgment finally determining the proceedings in respect of that party was sent to the parties. No such order may be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application*".

6. Rule 78 then contains provisions dealing with the amount of a costs order, and Rule 84 notes that a Tribunal may have regard to the paying party's ability to pay.

7. We were conscious that we were required to apply a two-stage test in relation to the question of whether or not to make a costs order. First, we had to consider whether the Claimant's conduct fell within rule 76(1)(a), and, if it did not, the application went no further. However, if we were satisfied that the Claimant's conduct had indeed fallen within rule 76(1)(a), we then had to go on to consider whether it would be appropriate to exercise our discretion in favour of awarding costs against him, and, if so, how much we should award.

8. We were also mindful of the guidance provided by the EAT in AQ Limited v Holden [2012] IRLR 648, that we should not judge the Claimant, as a litigant in person, by the standards of a professional representative, and, in particular, that lay people are likely to lack the objectivity and knowledge of law and practice brought to bear by a professional legal adviser.

9. With regard to the particular elements of rule 76(1)(a), i.e. whether the Claimant had acted vexatiously, abusively, disruptively, or otherwise unreasonably, we did not consider that there was anything in the Respondent's application to suggest that the costs order was being pursued on the basis of abusive or disruptive conduct. Instead, it appeared to us that the application was being made on the basis of what was contended to be vexatious conduct and/or on the basis of what was considered to be unreasonable conduct.

10. With regard to vexatious conduct, we noted the long established guidance set out in the case of ET Marler Ltd v Robertson [1974] ICR 72, that a claimant acts vexatiously if they bring a hopeless claim, not with any expectation of recovering compensation, but out of spite to harass their employer or for some other improper motive. We also noted the direction of the Court of Appeal in Scott v Russell [2013] EWCA Civ 1432, which approved the definition of "vexatious", given by Lord Bingham in Attorney General v Barker [2000] 1 FLR 759, that "*the 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 the use of the court process for the purpose or in a way which is significantly different from the ordinary and proper use of the court process*".

11. Finally, with regard to unreasonable conduct, we noted the guidance of the Court of Appeal in Yerrakalva v Barnsley Metropolitan Borough Council [2012] ICR 420, that the vital point in exercising the discretion to order costs is to look at the whole picture and to ask whether there has been any unreasonable conduct by the paying party in bringing, defending or conducting the case and, in doing so identify the conduct, what was unreasonable about it, and what effect it had.

The Application

12. The Respondent initially indicated that it wished its application to be considered at a hearing. However, once it became apparent that an in-person hearing would be impacted by the Covid-19 pandemic, and that a video hearing would not be possible due to the Claimant's lack of the required technology, the Respondent submitted, pursuant to a direction from the Tribunal, its written submissions in support of its application on 26 June 2020. The Claimant submitted his submissions in response to the application on 9 July 2020.

13. In its written submissions, the Respondent asserted that it was pursuing a claim under both rule 76(1)(a) and Rule 76(1)(b). However, we noted, at the commencement of our deliberations, that the initial application for costs, which had been made within the specified time limit of 28 days in the form of the Respondent's representative's letter of 12 November 2019, only made reference to an application under rule 76(1)(a). In the circumstances, we considered it appropriate only to consider the application under rule 76(1)(a), having decided that it would not be appropriate to exercise any discretion to extend time to include an application under Rule 76(1)(b), when no such application had been made within the specified time limit.

14. With regard to the claim under rule 76(1)(a), the Respondent, in its letter of 12 November 2019, had referred to threats made by the Claimant to contact various media outlets; obstruction and lack of cooperation in preparation for the hearing, particularly with regard to the exchange of witness statements; and to contentions that the Claimant had lied under oath in relation to the events which led to his dismissal.

15. In its written submissions in relation to the application under rule 76(1)(a),

the Respondent raised five specific matters which we considered in turn, and in relation to which our conclusions were as follows.

Conclusions

Ground One (Paragraphs 26 to 31)

16. This related to what the Respondent contended to have been a deliberate obstruction to the Tribunal's direction for the exchange of witness statements, and then a spurious objection to the admission of the Respondent's witness statements on the grounds that they had been served late, which led to an unnecessary application at the start of the hearing for permission to rely upon the witness statements.

17. We noted that on the day directed for the exchange of witness statements, Friday 18 October 2019, the Respondent's solicitor had attempted to effect mutual exchange of witness statements with the Claimant during the course of the afternoon. The Claimant then sent some witness statements at 23:50 on the day, albeit he did not send his own statement. The Respondent's solicitor then sent its witness statements to the Claimant on the afternoon of Sunday, 20 October 2019, having had no response to its previous communications.

18. The Claimant subsequently complained that he had not received the Respondent's witness statements and therefore that the Respondent had not complied with the order for the exchange of statements. This included the Claimant contending that he was "rejecting" statements not sent by 18 October.

19. The Claimant's own statement was subsequently received by the Respondent on 22 October 2019, the Claimant, stating that he had sent that with the other statements on 18 October 2019. The Respondent contended however, that, when the properties of the Claimant's witness statement document were examined, it showed that it had been created on 19 October 2019 and therefore could not have been sent to the Respondent on 18 October as the Claimant had contended.

20. The Respondent contended that the Claimant had, by refusing to exchange witness statements with the Respondent during the course of 18 October, engineered a situation where he could object to the admission of the Respondent's witness statements.

21. We concluded that that is indeed what the Claimant had sought to do, and that the Claimant's conduct in this regard had been both vexatious, in the sense of having been designed to cause inconvenience to the Respondent, and unreasonable. Notwithstanding that the Claimant was representing himself, and therefore would be inexperienced in the process of exchanging witness statements, the Respondent's representative made it very clear on the relevant day that he wished to exchange statements, i.e. for the parties to send their statements to each other at approximately the same time, and was met with obstruction by the Claimant until such time as the Claimant himself sent statements just before midnight on the relevant day. Had the Claimant not acted unreasonably and vexatiously, statements could have been exchanged on 18 October.

22. However, in terms of the effect of that unreasonable and vexatious conduct, we did not consider that there was a significant impact on the work undertaken by the Respondent in overall preparation for the hearing. The statements were exchanged, finally, on 22 October 2019, which left time for preparation for the hearing, which commenced on 25 October 2019.

23. The Respondent was, however, put to expense in the form of its solicitor having to deal with correspondence with the Claimant over the witness statement issue, which, if the Claimant had acted reasonably, it would not have incurred. We assessed that the Respondent's solicitor would have spent some two hours on dealing with this matter which, at the hourly rate advanced by the Respondent of £225.00, led to an order for costs against the Claimant in the sum of £450.00.

Ground Two (Paragraphs 32 and 33)

24. The Respondent contended that the Claimant had lied in his evidence to the Tribunal about a particular incident which led to his dismissal and, in support of that lie, had fabricated a document. Whilst we did not specifically express our conclusions on what the Claimant had done in terms of lies or falsification, the practical reality of our decision was that we did not accept the evidence advanced by the Claimant on those points.

25. However, for the purposes of the costs application, we noted that those matters had been raised by the Claimant during the course of his disciplinary hearing and had not been accepted by the Respondent at that time. Whilst, at one level, it might be said that the continued advancement by the Claimant of those particular points in the proceedings before us amounted to vexatious and/or unreasonable conduct, we did not see that that would have had any material effect on the costs incurred by the Respondent in defending itself at the hearing. The Respondent was faced with an unfair dismissal claim, and defended that on the basis of providing evidence to establish that it had dismissed the Claimant by reason of conduct and that its dismissal of the Claimant for that reason was fair. That evidence dealt with the Claimant's contentions regarding the event which led to his dismissal and what he contended to be evidence which supported his position in the form of the fabricated document.

26. We considered therefore, that the Respondent would have adduced that evidence in any event and would not have been put to any material additional expense as a result of any unreasonable conduct on the part of the Claimant.

Ground Three (Paragraphs 34 and 35)

27. The Respondent contended that photographs which the Claimant produced at the hearing, which he had contended would provide evidence of breaches of legal obligation by the Respondent, did not demonstrate those matters as he had asserted. The Respondent contended that this was a deliberate tactic to intimidate and pressurise the Respondent with threats of adverse publicity arising from the Tribunal proceedings.

28. Overall, whilst we agreed that the photographs did not appear to

demonstrate all that the Claimant had contended they would, they did nevertheless form part of the Claimant's underlying case with regard to the protected disclosures that he asserted he had made. Whilst we did not consider that the disclosures he had made were protected disclosures, and, indeed, the photographs had not been provided to the Claimant to the Respondent during the course of the Claimant's employment and therefore could not have had a bearing on that matter, we considered it appropriate to apply the AQ Ltd v Holden guidance and noted that the Claimant, as a litigant in person should not be judged in this regard in comparison with the standards that might be expected of a representative.

29. It is not unusual for a claimant to be mistaken in the strength of the claim they are pursuing, or even in relation to the question of whether the Tribunal is ultimately able to deal with the points they are raising, and it appeared to us that, even though the photographs did not ultimately have any relevance for us, he should not be considered to have acted vexatiously or unreasonably by adducing photographs which, whilst only to a limited degree, did provide some support for what he was contending, even though they did not cover all the areas he had contended.

Ground Four (Paragraph 36)

30. The Respondent contended that the Claimant's assertion that he had disclosed material adverse to the Respondent to an unnamed TV production company, and had entered into a pre-contract with the TV company, involved an attempt to pressurise and intimidate it.

31. We readily concluded that the Claimant's purpose in making the statements, whether in fact the underlying contact had occurred or not, was indeed vexatious and/or unreasonable, on the basis that we considered that they were intended to inconvenience and harass the Respondent, presumably with a view to pressuring it to reach a settlement. However, notwithstanding that conclusion, we did not consider that the effect of that conduct involved any additional costs being incurred by the Respondent to those which it had to incur in defence of the claim in any event.

Ground Five (Paragraph 37)

32. The Respondent contended that the fact of the Claimant's disclosure of the Respondent's confidential and commercially sensitive information to a competitor had been designed to portray the Respondent in a derogatory light.

33. In this regard, we noted that these comments were contained in an email to one of the Respondent’s competitors, which effectively appeared to form an application by the Claimant for a job with that competitor. We concluded that the comments were indeed designed to betray the Respondent in a derogatory light, although we considered that they may be viewed as having been more intended to paint the Claimant in a positive light, than to paint the Respondent in a derogatory light. However, as with some of the other aspects of the Respondent's application, we did not consider, even if the Claimant's conduct in this regard had amounted to vexatious and/or unreasonable conduct, that it had had any adverse impact on the Respondent in terms of causing it to incur additional costs.

34. Overall, therefore, whilst we were satisfied that the Respondent had indeed acted vexatiously and/or unreasonably in several of the ways contended by the Respondent, we did not consider that the conduct had caused the Respondent to incur any additional costs other than in the one area we have identified above. In total therefore, we considered appropriate only to order the Claimant to pay costs of the Respondent in the sum of £450.00.

Employment Judge S Jenkins

10 November 2020

Date

JUDGMENT & REASONS SENT TO THE PARTIES ON
12 November 2020

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FOR THE TRIBUNAL OFFICE