



## EMPLOYMENT TRIBUNALS

**Claimant**

**Respondent**

**v**

**Miss E Alegado**

**1) Guys and St Thomas' NHS  
Foundation Trust  
2) Ms Manda Mootien**

**Before: Employment J Webster**

### **COSTS APPLICATION JUDGMENT**

1. By a letter dated 31 December 2020 the respondent made an application for costs under rule 77 \*Employment Tribunal Rules of Procedure 2013 ('The Rules'). That application was in time. The respondent's application was sent to the claimant's lay representative (Mr Alegado) for comment. The parties have agreed that I can dispose of the application on the papers.
2. Unfortunately, the respondent's application was not forwarded to me for some time after receipt and there was then a further delay in it being sent to the claimant for comment and in the claimant's response (dated 4 March 2021) being forwarded to me. I am grateful to the parties for their patience in this matter.
3. In summary, the basis of the respondent's costs application is that the claimant acted unreasonably in bringing the proceedings engaging Rule 76(1)(a) and that the claim had no reasonable prospect of success engaging Rule 76(1)(b). As part of the costs application they sent a copy of a letter dated 30 July 2020 addressed to the claimant and her representative. That letter set out, in some detail, the legal and factual obstacles that lay before the claimant in proving her case and warning her that they would apply for costs should she continue to pursue her claims. I shall not repeat the substance of the letter here save to say that the warnings were by and large accurate and set out in an explanatory tone as opposed to a threatening one.

4. A summary of the claimant's position is:

- (i) That she was not legally represented or advised at any stage;
- (ii) That the tribunal had to hear the facts before determining the validity (or otherwise) of the claim and therefore the claims cannot have been entirely without prospects and therefore she did not behave unreasonably in bringing the claim; and
- (iii) That they were not in a position to give the respondent's representative's letter dated 30 July 2020 any weight as the lawyers represented the opponent and had conflicting information regarding whether costs would be sought by the respondent.
- (iv) The respondent made no effort to apply for a strike out or deposit order at an earlier stage in the proceedings which they would have done had they genuinely believed that the claim had no merit.

The Law

5. The tribunal can award costs at its discretion in accordance with Rules 75-78. A tribunal may make a costs or preparation time order, and must consider whether to do so, where it finds that:
  - (i) A party, or their representative, has acted vexatiously, abusively, disruptively, or otherwise unreasonably in the bringing or conducting of the proceedings, or a part of them Rule 76(1)(a).
  - (ii) Any claim made in the proceedings by a party had no reasonable prospect of success (Rule 76(1)(b)).
6. Where the case falls into a category in which costs may be awarded, case law has emphasised that the tribunal has a wide and unfettered discretion and the EAT will not minutely pick apart the decision (*Barnsley Metropolitan Borough Council v Yerrakalva [2012] IRLR 78*).
7. A tribunal must also approach a costs award under Rule 76(1)(a) and (b) in two stages. Firstly to consider whether the conduct/claim fits within that outlined under Rule 76(1)(a) and (b) and secondly to exercise its discretion as to whether a costs award ought to be made in those circumstances. In other words just because the test at stage one is met, it does not automatically mean that costs will be awarded; there is room for discretion.

Facts and conclusions

8. I have carefully considered both aspects of the claimant's claims in this matter which I refer to as the whistleblowing claims and the national minimum wage claims. I have read the paragraphs that the respondent refers to as demonstrating our conclusion that the claimant was not a reliable witness and agree with Mr Lanyado's assessment that this is not what those paragraphs say. However, we did by and large, prefer the respondent's evidence on all

matters. Further we found that the claimant was someone who was unable to take any form of criticism regarding her performance; and that almost all criticisms had been misinterpreted as detriments. We found that this interpretation was wrong. We also concluded that many of the alleged detriments relied upon did not occur in the way she described or at all. However, we stopped short of finding that the claimant's misinterpretation was a deliberate conceit.

9. I do not conclude that the claimant acted unreasonably in bringing the claim on the basis that she *'put forward a case based on factual premises which she did not, or did not reasonably, know to be true.'* (R's letter to Tribunal dated 31 December 2020 applying for costs). We did not reach those conclusions in our Judgment. The claimant's interpretation of events was different to those of the respondent but we did not conclude that she did not know them to be true or ought reasonably to have known that they were incorrect.
10. Turning to whether the claims had no reasonable prospects of success. I accept that the Claimant's National Minimum Wage claim had no reasonable prospects of success. The claimant had no understanding of the National Minimum Wage at the relevant time or when bringing the claim to the tribunal. I do not accept Mr Lanyado's submission that:

*"All that can be said is that it failed as a matter of law, and on the facts. That is a conclusion made after the event."* (letter to Tribunal dated 4 March 2021).

The claimant made no reference at any time before her claim was brought in the tribunal that she had not been paid the National Minimum Wage (NMW) and we did not accept that the claimant thought she had not been paid the NMW at the relevant time. This was something that was apparent on the face of the facts and the pleadings and the respondent's letter to the claimant dated 30 July was correct in its outline of the law in this respect. To try and shoehorn the fact that she was missing payment for one shift into a national minimum wage claim was a stretch even for a litigant in person.

11. Turning to the whistleblowing claims. This case was less clear on the facts as to whether the claimant's claim had no reasonable prospects of success. Whilst we found that many of the detriments relied upon by the claimant did not happen in the way she alleged, we do not accept the respondent's written submissions that this meant that "the claimant did not, or did not reasonably believe that she had been subjected to the detriments claimed or that such alleged detriments were related in any way to any protected disclosure made by her". Further, whether or not any detriments had occurred because of a disclosure did require careful consideration of the facts as outlined by all parties to the tribunal.

12. This was a time consuming and difficult claim for the respondent to defend and the second respondent in particular was put to a great level of personal stress and anxiety because of the claims against her. I have concluded that one of the claimant's claims had no reasonable prospects of success from the outset and satisfies s 76(1)(b) of the Rules. This was pointed out to the claimant and Mr Lanyado at a relatively early stage of the proceedings by the respondent's representative.
13. Nevertheless, I have to weigh this against the fact that the claimant was not legally represented and that costs in tribunals are the exception not the norm. There had not been an application for either a strike out or a deposit order in respect of either claim by the respondent at any stage. Whilst that does not have to be a step taken by the respondent, it would clearly have been an option open to them particularly with regard to the National Minimum Wage claim once disclosure had occurred. I accept that the letter dated 30 July from the respondent's lawyers to the claimant's lay representative was reasonable in tone and content; but it is not unreasonable for a non-legally represented claimant to treat such correspondence with a degree of cynicism and mistrust.
14. I do not consider that the whistleblowing claims could be said to be entirely without prospect of success before we heard the claim or that the claimant behaved unreasonably (in accordance with the unreasonable behaviour required for s76(1)(a)) in pursuing them. Although we found she misinterpreted events, we did not find that she deliberately manufactured false accounts, albeit we preferred the respondents' explanations in almost all our factual findings.
15. This has been a difficult costs application to determine as I recognise the costs and time that the respondents were required to incur to defend this case and note the reasonable behaviour of the respondent throughout the conduct of the case including the sending of the letter dated 30 July 2020.
16. Nevertheless, on balance, I exercise my discretion not to order the claimant to pay some or all of the respondent's costs in this matter. Costs awards are the exception not the rule. The claimant was not legally represented and whilst part of her claim was without prospect of success from an early stage, the whistleblowing claims do not fall within that category and the respondent would have been put to almost, if not all, the same cost in defending the whistleblowing claim as they were in defending both claims at once.
17. I therefore refuse the respondent's application for costs.

Employment Judge Webster

Dated: 31 March 2021

