EMPLOYMENT TRIBUNALS

Claimant: Mrs S Loofe

Respondent: Tamicare Limited

Heard at: Manchester **On:** 14 April 2021

Before: Employment Judge Ainscough
(sitting alone)

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's application for a costs order is successful.

2. The respondent is to pay the claimant £13,162.20.

REASONS

Introduction

1. Following the final hearing, but prior to the remedy hearing, the claimant made an application for costs on 18 March 2020. The claimant seeks payment of costs incurred by her from 6 November 2019 in accordance with rule 76 of the Employment Tribunal (Constitutions and Rules of Procedure) Regulations 2013, on the basis that:

   (a) the respondent has conducted part of the proceedings vexatiously; and

   (b) the response had no reasonable prospect of success.

2. At the conclusion of the remedy hearing on 23 March 2021, I heard submissions from both representatives about the costs application. In addition, as the respondent's representative did not have specific instructions on that application, I allowed the respondent to provide an additional response in writing by no later than 6 April 2021.

The Proceedings

3. The claimant was dismissed on 29 November 2018 and submitted her claim for unfair dismissal and wrongful dismissal on 20 February 2019. On 29 March 2019 the respondent submitted a response denying all claims.

4. The matter was listed for a final hearing on 4-5 November 2019 before me. On those dates, I heard evidence from the respondent witnesses. There was insufficient time to hear the claimant's evidence and as a result, the matter was listed for hearing on 13 and 14 October 2020.

5. I heard evidence from the claimant on 13 October 2020, and on 14 October 2020 I deliberated and gave oral judgment to the parties.

6. The respondent made a request for written reasons of that Judgment and they were provided to the parties on 7 December 2020.

7. A remedy hearing took place on 23 March 2021 and the respondent was ordered to pay the claimant both a basic and compensatory award.

8. On 6 April 2021 the respondent requested written reasons of the remedy judgment.

Claimant's Application

9. By way of a letter to the Tribunal, copied to the respondent's representative on 18 March 2021, the claimant made an application for payment of costs incurred from 6 November 2019 until the remedy hearing on 23 March 2021.

10. The basis of the claimant's application was that the claimant's representative had written to the respondent's representative on 6 November 2019 immediately following the first part of the final hearing to assert that the response had no reasonable prospect of success. The claimant's representative contended that should the respondent continue to defend the claim the claimant would seek her costs.

11. On 6 November 2019 it was put to the respondent that the witness evidence given by the respondent witnesses demonstrated a lack of proper or reasonable investigation, absence of any knowledge of the process by key decision makers and acceptance of errors made in the allegation raised against the claimant.

12. In addition, it was put to the respondent that there was a risk that the Tribunal would find that there had been tampering with evidence.

13. The claimant submitted that this letter was ignored and the respondent continued with its defence to the claim. It was submitted it was therefore necessary for the claimant to incur costs at the part-heard hearing which resumed on 13 and 14 October 2020.

14. The claimant submitted that following the finding of unfair dismissal, the claimant provided an updated Schedule of Loss to the respondent's representative on 29 October 2020 and asserted that the matter could be resolved without a

remedy hearing. The respondent's representative responded on 3 November 2020 asserting that the case handler was leaving and a new case handler would take over the file. It was also asserted that the respondent awaited written reasons.

15. The claimant's representative wrote to the respondent's representative on 14 January 2021 to provide evidence of the claimant's mitigation of loss and asserted that it was sufficient to show that the claimant had mitigated her loss and they sought agreement of the Schedule of Loss from the respondent.

16. As a result of a lack of response to that letter, the claimant's representative wrote again on 22 January 2021 and put the respondent's representative on notice that in light of the listing of the remedy hearing, the claimant was considering making a costs application as a result of the respondent's failure to engage.

17. It was submitted on behalf of the claimant that because the respondent disputed the claimant's Schedule of Loss, it was necessary to incur the cost of attending the remedy hearing on 23 March 2021.

18. The claimant also submitted that as a result of my finding at paragraph 56 of the Judgment, that "the respondent was unable to rebut the claimant's assertion that her holiday records had been deleted" - the respondent has acted vexatiously in the way that part of the proceedings have been conducted.

19. It was asserted on behalf of the claimant that during cross examination at the final hearing, the respondent witnesses accepted that the holiday forms completed by the claimant were not fraudulent. In addition, it was asserted that the respondent had accepted that there had been authorisation for the claimant to take Friday afternoons as holiday. It was also asserted that the respondent's witnesses had accepted that the claimant's private work was authorised.

20. The claimant contended that it was unreasonable for the respondent to continue with the second part of the hearing given that it was professionally advised. It was also submitted on behalf of the claimant that the submissions made by the respondent's representative at the end of the final hearing were different to the response that was submitted at the outset. The claimant asserted that this was because the representative was constrained by the answers given by the respondent's witnesses.

21. The claimant asserted that my finding at paragraph 56 is akin to a finding that the respondent has altered evidence about a central issue in the case. It had been the claimant's case that all holidays had been authorised, and the acceptance that the forms were not fraudulent only occurred during the hearing.

22. The claimant submitted that attempts were made to resolve the matter prior to the remedy hearing and the issues taken by the respondent about the Schedule of Loss have been abandoned.

Respondent's Response

23. At the conclusion of the remedy hearing, the respondent's representative asserted that despite the claimant's costs application being sent to the respondent's

representative's company, she herself had not seen that application until that day. It was asserted that she had been unable to take instructions from the respondent and required more time to consider the application before responding.

24. Rule 77 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 states that the paying party must have a reasonable opportunity to make representations. I therefore agreed that the respondent could make written submissions by no later than 6 April 2021.

25. On 6 April 2021 the respondent's representative submitted a response to the claimant's costs application and asserted that the response continued to have a reasonable prospect of success after the first part of the final hearing because the claimant had not given her evidence. The respondent submits that if the claimant had thought there was no reasonable prospect of success, she should have applied for a strike out or deposit order.

26. The respondent also submitted that an insistence on a remedy hearing cannot be viewed as vexatious or unreasonable conduct and a written Judgment may have been required for insurance purposes. It was submitted that the previous representative who conducted the final hearing was of the view that there had been a failure to mitigate by the claimant.

27. The respondent maintains that the Outlook calendar was altered to remove confidential client details from the record and offered expert evidence. It is submitted that my finding at paragraph 56 does not go far enough to evidence that there had been vexatious conduct/improper motive.

28. The respondent also submitted that in light of the pandemic the respondent's business has been dramatically affected and that the company accounts provided will show that the respondent is not in a position to make payment.

29. The respondent submits that its conduct does not fall within either rule 76(1)(a) or 76(1)(b) and in the alternative that if it does, the Tribunal should not exercise its discretion in favour of awarding costs.

Relevant Legal Principles

30. Rule 76(1) states:

> "**When a costs order or a preparation time order may or shall be made**
>
> (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.

(c) a hearing has been postponed or adjourned on the application of a party made less than 7 days before the date on which the relevant hearing begins.

31. Rule 77 states:

"Procedure

A party may apply for a costs order or a preparation time 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."

32. Rule 78 states:

"The amount of a costs order

(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 he 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, or by an Employment Judge applying the same principles;

(c) under 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.

33. Rule 84 provides the Tribunal can have regard to the paying party's ability to pay, but the Tribunal is not obliged to take this into account when determining whether to make a costs order.

34. In **Scott v Russell 2013 EWCA Civ 1432, CA** the Court of Appeal approved the House of Lords definition of vexatious conduct in **Attorney General v Barker 2000 1 FLR 759 QBD** as conduct which is designed to inconvenience the other party and that has little or no basis in law such that the proceedings are an abuse of the court process. The Employment Appeals Tribunal held in **AG Ltd v Holden 2012 IRLR 648, EAT** that simply being misguided was not evidence of vexatious conduct.

35. In **Meadowstone (Derbyshire) Ltd v Kirk and another EAT 0529/05 (2005)** the Employment Appeals Tribunal concluded that the respondent knew the defence was unmeritorious and untrue and therefore had no reasonable prospect of success and upheld the costs award.

36. In **Yerrakalva v Barnsley Metropolitan Borough Council and another 2012 ICR 420, CA** the Court of Appeal reiterated that costs in the Employment Tribunal are the exception rather than the rule.

37. In **Lodwick v Southwark London Borough Council 2004 ICR 884, CA**, the Court of Appeal determined that at both stages of the Tribunal's discretion to make a costs award, the fundamental principle that costs awards are compensatory not punitive, must be observed.

Discussion and Conclusions

Did the respondent act vexatiously in the conduct of part of the proceedings?

38. The finding I made at paragraph 56 of the Judgment was that the respondent was unable to rebut the claimant's assertion that there had been a deletion of her holiday records. I did not find that the respondent had intentionally deleted the claimant's holiday records. It is a fact that the holiday records had been deleted. The respondent asserted that this had happened when it had attempted to delete confidential information pertaining to its clients that could not be disclosed in a public hearing. I was not provided with sufficient evidence to conclude one way or the other whether the respondent had done this intentionally.

39. Therefore, I do not conclude that the respondent was vexatious in the conduct of part of the proceedings. I do not conclude that the records were deleted to inconvenience the claimant or to amount to an abuse of process.

Did the respondent's response have no prospect of success?

40. In paragraph 71 of the Judgment, I found that the respondent had not conducted a reasonable investigation based on the answers given in evidence by the respondent witnesses. I also found that Mrs Giloh did not inform the dismissal officer or the appeals officer of the working practices that she had found acceptable prior to Mr Shtrosberg's employment and for which, the claimant was dismissed.

41. The claimant is right to submit that during the course of evidence both Mr Shtrosberg and Mrs Giloh conceded that the forms completed by the claimant were not fraudulent. In particular, Mrs Giloh admitted that the claimant had authority to take ad hoc leave to care for her father and had authority to take each Friday afternoon off and conduct personal work in the respondent's time.

42. The claimant was dismissed on the grounds that she had:

(1) falsified forms to obtain additional leave;

(2) intentionally failed to calculate her Friday leave correctly;

(3) intentionally failed to record the leave she had taken for caring for her father; and

(4) conducted personal work during the working day.

43. The respondent witnesses made these admissions during the first part of the hearing. Therefore, evidence existed after the first part of the hearing about the cogency of the respondent's belief and the genuineness of the respondent's belief in regard to the claimant's conduct. Mr Shtrosberg was also unable to account for the range of his investigation or whether he had in fact completed the final investigation report.

44. The evidence given by the claimant at the resumed hearing on 13 and 14 October 2020 was focussed on the respondent's representative trying to discredit the claimant's assertions that the investigation was unreasonable and the decision to dismiss was outside the range of reasonable responses.

45. The respondent's witnesses had made admissions that the respondent did not have a reasonable and genuine belief in the claimant's alleged gross misconduct and I made this finding.

46. In light of the admissions made by Mr Shtrosberg in regard to the investigation, I concluded that there was no reasonable investigation and the dismissal was unfair in all the circumstances.

47. I therefore accept the claimant's submission that following the first part of this hearing, the respondent had no reasonable prospect of successfully responding to the claimant's claim.

<u>Did the respondent's response to the claimant's Schedule of Loss have no reasonable prospect of success?</u>

48. It is asserted that because the claimant was able to provide evidence of applications for over 200 jobs during her period of unemployment, the respondent should have accepted the losses detailed in her Schedule of Loss. The respondent asserts that it had every right to dispute the level of mitigation undertaken by the claimant at the remedy hearing on 23 March 2021.

49. At the outset of the remedy hearing the respondent's representative sought an adjournment on the basis that she had only been handed the file the night before

and was not in receipt of proper instructions on behalf of the respondent. That application was refused on the basis that the respondent had had sufficient notice of the remedy hearing.

50. The respondent's representative had submitted a counter Schedule of Loss which, at the outset of the hearing, she withdrew, and the respondent limited its response to the claimant's Schedule of Loss, to questions under cross examination. The respondent also conceded payment of the basic award. There were attempts during the cross examination of the claimant to open issues that had been determined at the final hearing. The respondent was unable to adduce or provide any evidence to rebut either the claimant's Schedule of Loss or mitigation.

51. The respondent was unable to adduce any evidence that the claimant had failed to mitigate her losses. The cross examination was focussed upon trying to prove that the claimant was not entitled to the medical insurance payment. It was clear from the payslips alone that the claimant was entitled to this payment.

52. The respondent made no serious attempt to challenge the claimant's Schedule of Loss and produced no evidence to prove that the claimant had failed to mitigate her losses. I therefore conclude that the respondent's response to the remedy issue had no reasonable prospect of success prior to the remedy hearing.

Tribunal's discretion to make costs order

53. In accordance with rule 76(1)(a) and (b), I must also consider whether to make a costs order against the respondent.

54. I am conscious that costs in an Employment Tribunal setting are the exception rather than the rule that exists in other jurisdictions.

55. I have seen evidence that the claimant's representative placed the respondent's representatives on notice of this application on two separate occasions, and on each occasion the respondent chose not to substantively respond. Engagement with the claimant's representative may have caused the respondent to pause and consider the merits of continuing with the response after the first part of the hearing had concluded. As it did not, the claimant was put to the expense of attending the second part of the hearing.

56. Rule 84 provides that I can consider the respondent's ability to pay any such costs order when deciding whether to exercise my discretion as well as, if I do, the amount of any award.

57. The respondent's representative has provided a set of company accounts which show that to the year end 31 December 2020 the respondent had a loss of income. The second page of the accounts shows that to the year end 31 December 2020 the respondent had fixed assets of approximately £1.1million. Taking into account current liabilities, the net asset recorded is £773,572.

58. My understanding of these accounts is that the respondent does have assets of this amount and would be in a position to pay any costs award should one be made.

59. I am conscious that costs awards should be compensatory and not punitive. Following the first part of the final hearing, the claimant attempted to bring a close to these proceedings and was largely ignored by the respondent. Even after the claimant had been successful with her claim, she still attempted to avoid the cost of a remedy hearing and again was largely ignored by the respondent.

60. Similarly, engagement at this latter stage may have avoided the remedy hearing, during which the respondent was unable to seriously dispute the claimant's schedule of loss.

61. I find that the claimant should be compensated for those costs incurred following her attempts after the first part of the final hearing to resolve the matter to avoid incurring any further legal costs.

The amount of the award

62. I have considered the schedule of costs submitted on behalf of the claimant that she incurred from 6 November 2019 until 23 March 2021.

63. The respondent has not made any specific submissions on the amounts claimed in that schedule of costs. The amounts claimed by both the instructing solicitors and counsel are not excessive.

64. I therefore accept the schedule of costs submitted by the claimant's representatives and order the respondent to pay the sum of £13,162.20 to the claimant as reimbursement of costs incurred by her since 6 November 2019.

Employment Judge Ainscough

Date 2 July 2021

JUDGMENT AND REASONS SENT TO THE PARTIES ON

5 July 2021

FOR THE TRIBUNAL OFFICE