EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mrs Marie-Antionette St Joseph **v** **Citywest Homes Services Limited**

Heard at: London Central **On**: 7 May 2021

Before: Employment Judge E Burns
Mr David Carter
Mr Paul Secher

Representation

For the Claimant: In person

For the Respondent: Mr S Harding (counsel)

JUDGMENT

The unanimous judgment of the Tribunal is:

(1) The claimant is ordered to pay the respondent £20,000 in costs.

(2) As the claimant has paid a deposit of £80, this will be put towards the costs, leaving her with £19,920 to pay.

(3) The respondent is not ordered to pay for any of the claimant's preparation time.

REASONS

THE HEARING

1. The purpose of the hearing was to consider the applications made by each of the parties for costs (respondent) and preparation time (claimant) respectively.

2. The respondent's application was made on 25 February 2021 under rule 76(1)(a) on the basis that the claimant had acted vexatiously, abusively,

disruptively or otherwise unreasonably in the bringing of the proceedings. The respondent relied, in part, on the fact that deposit orders had been made in the case and the operation of Rule 39(5). The application was for £20,000.

3. The claimant's application, dated 31 July 2020, was for preparation time under rule 76(1)(a) on the basis that the respondent or its representative had acted vexatiously, abusively, disruptively or otherwise unreasonably in the way that the proceedings had been conducted. The application was for £112,500.

4. The hearing was a remote hearing conducted by video. We had a small bundle of relevant documents, and were able to refer to the bundle used at the final hearing where liability was determined.

5. The claimant had not prepared any witness evidence as to her means. Evidence was adduced from her through Employment Judge E Burns asking her a series of questions in this regard.

LAW

6. The tribunal rules enable a represented party in employment tribunal litigation to make an application for a cost order and an unrepresented party to make an application for a preparation time order. The difference is that a costs order is made where a legally represented party incurs legal fees and is normally made for the actual amount of the legal fees incurred. A preparation time order is made based on the time spent by a non-legally represented party working on their case. The amount awarded for the latter is currently £41 per hour.[1]

7. The test which the tribunal must apply is the same in both cases and can be found in Rule 76. The relevant part of the rule for the purpose of this hearing is 76(1)(a) which says:

"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."

8. The tribunal must consider an application in two stages:

- we must first decide whether the threshold test is met, i.e. has the relevant party acted vexatiously, abusively, disruptively or otherwise

- if we are satisfied the test has been met, we should then decide if we should exercise our discretion to award costs

[1] Pursuant to rule 79(2) it was £33 in October 2013. It has increased by £1 each year on 6 April.

Each case depends on the facts and circumstances of the individual case.

9. Although the 'threshold tests' are the same whether a litigant is or is not professionally represented, the decision in *AQ Ltd v Holden* [2012] IRLR 648, EAT requires us to take the status of the litigant into account.

10. Some assistance in determining if the threshold tests are met is found in Rule 39(5) which applies where a prior deposit order has been made under Rule 39. Rule 39 (5) says:

"*If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—*

(a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and

(b) the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders), otherwise the deposit shall be refunded."

11. In order for Rule 39(5) to apply, there need only be a broad similarity between the reasons for making the deposit order and the reasons leading to the finding against the party

12. Although Rule 39(5) results in a presumption of unreasonableness, this does not mean that a tribunal must automatically make an order for costs or preparation time. It must still ask itself whether it is appropriate to exercise its discretion in favour of an award.

13. The value of a costs order is determined by Rule 78(1) which says:

"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 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"*

14. Awards are intended to be compensatory, not punitive *(Lodwick v Southwark London Borough Council* [2004] IRLR 554). This means that where costs are claimed because a party has acted unreasonably in conducting a case, the costs awarded should be no more than is proportionate to the loss caused to the receiving party by the unreasonable conduct. In other words, the party is entitled to recover the cost of any extra

work that had to be undertaken because of the unreasonable conduct, or the fees.

15. Rule 84 is also relevant. It says:

*"In deciding whether to make a costs, preparation time, or wasted costs order, and if so in what amount, the Tribunal **may** have regard to the paying party's (or, where a wasted costs order is made, the representative's) ability to pay."*

16. We emphasise the word "may" because the tribunal is permitted but not required to have regard to the means of the party against whom the order is made. A tribunal can make an award even if the paying party has no ability to pay, provided that we have considered means. We must do this even when the paying party does not raise the issue of means directly. We must say whether or not we have taken the paying party's means into account

Decision on Respondent's Application

17. A deposit order requiring the claimant to pay five separate deposits totally £80 was made by Employment Judge Quill in this case following a preliminary hearing heard on 12 and 13 August 2019. The issues were clarified before he heard and decided the application for the deposit order.

18. The order (which was sent to the parties on 14 August 2019) was as follows:

17.1 £20 in respect of the claimant's allegation that she was automatically unfairly dismissed pursuant to section 103A of the Employment Rights Act 1996;

17.2 £20 in respect of the claimant's allegations that she was victimised pursuant to section 27 of the Equality Act 2010;

17.3 £10 in respect of the claimant's allegations that she was subjected to age related harassment pursuant to section 26 of the Equality Act 2010;

17.4 £10 in respect of the claimant's allegations that she was directly discriminated against because of age pursuant to section 13 of the Equality Act 2010; and

17.5 £20 in respect of the claimant's allegation that she was directly discriminated against because of marital status pursuant to section 13 of the Equality Act 2010.

19. Employment Judge Quill gave detailed reasons for making the deposit order. He did not make a deposit order in respect of the claimant's claims for holiday pay, unlawful deductions of wages and breach of contract.

20. The tribunal panel hearing the costs application was the same tribunal panel that had determined liability in this case. Our decision was that none of the claimant's claims succeeded. We gave detailed reasons for our decision.

21. We are satisfied that our reasons for rejecting the claims are sufficiently similar to those given by Employment Judge Quill when he made the deposit orders. His reasons were as follows:

Section 103 claim for automatic unfair dismissal

22. Employment Judge Quill's decision on this claim was made on the basis that:

- The claimant would have difficulty in proving the respondent was aware of the previous employment tribunal claim and any protected disclosures contained within it
- The claimant would struggle to show that the reason for her dismissal was the protected disclosures (if they existed) rather than her decision not to attend work

23. Our reason for rejecting this claim was that the claimant had not made a protected disclosure in accordance with the requirements of the Employment Rights Act, but in any event, the respondent's employees were not aware of the claim. We also found that the reason for the respondent's decision to dismiss the claimant was her unreasonable refusal to attend work.

Victimisation pursuant to section 27 Equality Act 2010

24. Employment Judge Quill's decision on this claim was made on the basis that:

- The claimant would have difficulty establishing that the relevant people at the respondent were aware of her previous tribunal claim (her first protected act)
- Her second purported protected act did not appear to meet the requirements of a protected act
- A likely inability to establish she suffered detriments because of the protected act(s) particularly as there was nothing inherently suspicious about the detriments about which she was complaining

Our reason for rejecting this claim was because none of the respondent's employees were aware of the previous employment tribunal claim. We found that the second purported protected act was not a protected act. We also found that she suffered no detriments.

Harassment Related to Age and Direct discrimination because of Age

25. Employment Judge Quill's decision on these claims was made on the basis that:

- There was nothing self-evident about the claimant's allegations that she was being subjected to conducted related to her age
- The claims, in any event, may be out of time

26. Our reason for rejecting the claims was consistent with his reasons.

Direct discrimination because of marital status

27. Employment Judge Quill's decision on this claim was made on the basis that:

- The comments allegedly made included no express reference to marital status
- The claims, in any event, may be out of time

28. Our reason for rejecting the claim was based on similar reasoning.

29. It is relevant to note our decision to reject the claimant's claims in full was not a difficult decision for the panel to make. It was not a claim where we felt that our decision making was finely balanced or difficult. The claimant presented so little evidence to support her allegations that we considered that the claim was entirely without merit.

30. What was particularly striking, however, was the number of times we made findings that the claimant had interpreted an innocent action by a colleague, carried out in the ordinary course of work, as constituting unfavourable treatment of her. The claimant made similar types of allegations in her earlier claim and we are very concerned that she might make other similar claims in the future. She was not deterred by the deposit orders and the time that Employment Judge Quill spent carefully explaining why her claim was likely to fail, but instead of heeding what he had told her, she decided to continue.

31. The claimant was urged by Employment Judge Quill and the respondent to seek legal advice before paying the deposits and proceeding with the claim. She could have accessed free legal advice from a number of sources, but chose not to and instead ran the claim herself.

32. The total costs incurred by the respondent came to £41,450 (which includes counsel's fees). This figure included costs incurred dating back to before the deposit orders were made and in defence of the three minor claims where no deposit orders were made. The respondent had, however, limited its costs application to £20,000 in order that it could be awarded without a detailed assessment. We were satisfied that more than £20,000 worth of costs had been incurred by the respondent since the deposit orders were made responding to the claims covered by those orders. Put simply, we are satisfied that the respondent has spent more than £20,000 in order to defend a completely unmeritorious claim.

33. We enquired about the claimant's means. The figures she gave us were not entirely coherent and were not supported by any documentation, but we have no reason to doubt that she had very little disposable income. Neither

she nor her husband are in employment and so they are therefore entirely dependent on benefits and living in social housing. They have 5 children under 18 living with them. They have no savings and are paying off an existing debt of £15,000 at the rate of £1 per month.

34. Having taken into account the full circumstances, we decided not to take the claimant's means into account when exercising our discretion and to award the respondent the full £20,000 being sought.

C's application

35. As noted above, the claimant's application was based on the respondent having behaved unreasonably in the way it conducted the proceedings. In particular, she complained about the disclosure process (she described this as spoilage and delay) and the fact that the final hearing had been postponed.

36. It was necessary to go through and establish the relevant history of the litigation.

37. As well as making deposit orders on 12 and 13 August 2019, Employment Judge Quill made case management orders.

38. There had been standard case management orders issued before this date. The claimant was unhappy with the respondent's compliance with the orders. The claimant had sent the respondent documents which she considered to be relevant and which she had spent time putting in a particular order that made sense to her. She was not happy with what the respondent's representative did with those documents. The claimant wrote to the respondent's representative on 5 July 2019 making a number of complaints. The letter is contained in the final hearing bundle at pages 247-148.

39. Employment Judge Quill dealt with the issue by setting new dates for the final hearing and fresh case management timetable. He listed the final hearing for 6 days starting on 23 March 2020 and ordered the following:

- Disclosure to be completed by 15 November 2019
- The final hearing bundle to be agreed by 29 November 2019 with the respondent required to provide the claimant with a hard copy by 18 December 2019
- Witness statements to be exchanged by 31 January 2020.

40. On 13 March 2020, Employment Judge Quill wrote to the parties to say he had decided to postpone the final hearing because it was clear to him as at that date that the 6 day hearing would not be ready in time. He ordered that a preliminary hearing in public be held instead on 23 March 2020 to consider whether any part of the either the claim or the response ought to be struck out on the grounds of non-compliance with the previous directions and to make further appropriate case management orders for the remainder of the litigation.

41. We have tried to piece together what happened between August 2019 and March 2020 based on the information available to us. Neither party was able to give us a complete set of correspondence, but we were referred to a lot of the correspondence between the parties during this period.

42. A problem arose following the August 2019 hearing because the respondent's representative did not receive the case management order following the August hearing. This led to a delay. However, once this was resolved and the order was resent to him, the parties worked co-operatively together to try to agree a bundle. The respondent's representative did not have any additional disclosure to add to that that had been sent to the claimant in July 2019.

43. She wanted the respondent's representative to change the order in which he was putting documents in the bundle. In the middle of the chain of correspondence about this in late November, the representative left. Although the claimant sent correspondence to the email address provided in his out of office, she did not receive a response. She waited until 15 January 2020 and wrote to the tribunal.

44. On 16 January 2020, a new representative wrote to the claimant to say he was talking over conduct of the file.

45. There followed a good deal of correspondence between the parties about various documents. The new representative sought additional disclosure from the claimant, but she refused to provide this until the bundle was re-ordered. The new representative also disagreed with the claimant about the relevance of some of the documents she had provided. The correspondence led to the respondent's representative writing to the tribunal to ask for an unless order on 27 February 2020. The claimant responded with a number of counter allegations which she sent in a letter to the tribunal dated 12 March 2020. It was in response to this correspondence that Employment Judge Quill postponed the final hearing.

46. The preliminary hearing in public on 23 March 2020 was not able to proceed. By this date the tribunal had stopped conducting hearings in person and converted all hearings into case management hearings by telephone because of the COVID-19 pandemic. A telephone hearing was conducted instead with Employment Judge Elliott, but she was unable to make any directions that advanced the case significantly because of the pandemic.

47. The claimant and the respondent's representative continued to engage in unhelpful correspondence regarding the bundle until he left and was replaced by a third representative. She simply agreed to include all of the claimant's documents in the bundle. We note that the final bundle was full of duplication and significantly longer than it needed to be because of this.

48. A further case management hearing was held in August 2020. It was conducted by Employment Judge Stewart who recorded the following:

"1. This case has had a fractious history and has been through considerable correspondence with the Tribunal and several previous PH Case Management hearings. On 13 August 2019, EJ Quill, having carried out a thorough review of the case thus far, refused a strike out application and made a series of deposit orders as a condition for the Claimant being able to pursue her claims. On 23 March 2020 EJ Elliott refused the Claimant's application for strike out for the Respondent's non-compliance with Tribunal Orders and relisted the hearing lost through the Covid 19 restrictions to January 2021.

2. The Claimant, as a litigant in person, feels aggrieved and frustrated by the Respondent's 'nonchalant and indifferent' handling of her case, as she explained to me this morning, for example; a) a delay from 20 May 2019, as directed by the Tribunal, until 3 July 2019 for exchange of lists on the Respondent's part; b) a delay in the Respondent's sending of documents from 17 June 2019, as per Tribunal directions, until March 2020; c) poor handling of documents and their inclusion in the bundle, which has now been remedied; d) a silence of some two and a half months during change of personnel in the Respondent's legal department.

3. Only the latter stages can be said to have been affected by the Covid 19 restrictions. Ms Chopra took over the conduct of the case on 22 June 2020, since which time matters have much improved. She told me today that prior to that, the correspondence shows an acrimonious relationship between the Claimant and the two persons having prior conduct of the case at the Respondent's end; Mr Clinch (who left the Respondent's employ in November 2019) and Mr Ward, on a temporary basis. There was clearly an hiatus in the multiple handovers of the Claimant's case between Respondent staff. Covid 19 restrictions have caused disruption and delays at the Respondent's offices since lockdown in March 2020. Mr Ward was shielding.

4. The case is now ready for the Full Merits Hearing in January 2021.

5. Having heard both parties extensively this morning, I decided that the proper time and place for the Claimant's costs/preparation time application to be determined is after the conclusion of that Full Merits Hearing."

49. Against that background, we considered the schedule of preparation time prepared by the claimant. She confirmed the following:

20/5/2019	The time set out against this date was time the claimant spent preparing her initial disclosure. She accepted it was time she would have spent regardless of the respondent's conduct.
17/06/2019	The time set out against this date was time the claimant spent preparing for a preliminary hearing on 3 June 2019.

	She accepted it was time she would have spent regardless of the respondent's conduct.
04/07/2019	The time set out against this date was not time the claimant spent doing any work. She told us this was how she was valuing the respondent's failure to comply, effectively by way of a fine
08/07/2019	The times set out against this date was the same as above.
July 19 to March 2020	The time set out against this date was in part the same as above, but also included 30 hours spent writing correspondence chasing compliance by the respondent, that she says she would not have had to write if the respondent's conduct had not been unreasonable
April 2020 to January 2021	The time set out against this date was not time the claimant spent doing work, but is effectively the delay between 23 March 2020, the date the final hearing was originally listed to start, and the date it did start, broken down into hours.

50. Costs are meant to be compensatory rather than punitive. They are meant to compensate the receiving party for the avoidable work that they have had to do because of the other party's conduct. The only entry in the respondent's schedule that potentially meets this requirement is the entry for 30 hours spent between July 2019 and March 2020 sending additional correspondence.

51. Having viewed a selection of the correspondence we are not satisfied that the claimant has demonstrated that the respondent's behaviour during this period meets the test of unreasonable conduct for the purposes of rule 76(1)(a).

52. There was a frustrating period when the claimant did not receive a response to her correspondence from the respondent's representative during to an issue with the handover, but this resolved in plenty of time to allow for the case to be prepared for the March 2020 hearing. The reason it was not ready for hearing then appears in part to be because of the claimant's intransigence about how she wanted her documents to be presented in the final bundle. In our judgment, she was as much to blame as the respondent for the position in March 2020.

53. In addition, we note that the hearing would not have been able to take place on 23 March 2020 because of the Covid-19 pandemic and so there was no actual prejudice to the claimant when it was postponed.

54. In conclusion, the respondent's behaviour does not meet the threshold of unreasonable conduct and therefore we make no order for costs against the respondent in favour of the claimant.

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Employment Judge E Burns
2 August 2021

Sent to the parties on:

02/08/2021.....

For the Tribunals Office