Case Number: 3313830/2020

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs Z Amri-Khellaf	**v**	Evergreen Homecare Services Ltd (formerly Surecare Barnet Ltd)

Heard at: **Watford (on the papers)** **On: 13 October 2021**

By: **Employment Judge O'Rourke**

COSTS JUDGMENT

The Claimant is ordered to pay the Respondent's costs in the sum of £20,000.

REASONS

Background and Issues

1. By a judgment 29 July 2021 (all dates hereafter, unless otherwise stated, are 2021), the Claimant's claim for unfair dismissal was dismissed, for material non-compliance with an 'unless' order. As a consequence, the Respondent applied, on 26 August, for an order that the Claimant be found liable for its costs.

2. The Tribunal wrote to the parties on 10 September, ordering the Claimant to respond to that application, setting out her grounds of resistance to it and providing evidence as to her ability to pay any such order. She was also asked to state whether or not she was content, as suggested by the Respondent that this matter be dealt with by way of written submissions only.

3. The Claimant responded on 24 September, enclosing bank statements and medical documents. She stated that she '*await*(ed) *the court's decision as to how it might treat this matter'*, which is taken as agreement that the matter can be dealt with by way of written submissions only.

4. The Respondent made further submissions on 4 October.

Rule 76 – When a costs order … may or shall be made

5. The Rule states:

'*(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 the bringing of the proceedings .. , or the way in which the proceedings have been conducted;
(b) ….
(c) ….

(2) A Tribunal may also make such an order where a party has been in breach of any order …

Rule 83 – ability to pay

6. The Rule states that '*in deciding whether to make a costs … order and if so, what amount, the Tribunal may have regards to the paying party's … ability to pay.*

The Law

7. I referred myself to the case of **Kovacs v Queen Mary and Westfield College [2002] EWCA Civ 352** which indicated that ability to pay is not a factor which an employment tribunal is required or entitled to take into account when deciding whether or not to make a costs order. **Yerrakalva v Barnsley Metropolitan Borough Council [2012] ICR 420 EWCA** indicates that a tribunal has a broad discretion in such matters and in exercising that discretion should look at the 'whole picture' and ask whether there has been unreasonable conduct by the Claimant in bringing or conducting his claim and in doing so, to identify the conduct, what was unreasonable about it and what effects it had. While ability to pay is a factor that a tribunal may take into account, it is not determinative as to the amount of costs ordered. **Arrowsmith v Nottingham Trent University [2011] EWCA Civ 797** states that (paragraph 37) '*The fact that her ability to pay was so limited did not, however, require the ET to assess a sum that was confined to an amount that she could pay. Her circumstances may well improve and no doubt she hopes that they will.*'

Submissions

8. Respondent. In summary, the Respondent made the following submissions:

    a. The Respondent first wrote to the Tribunal, in respect of the Claimant's non-compliance with Tribunal orders, on 29 April and then subsequently made four further applications due to continuing non-compliance.

b. The terms of the 'unless' order made on 15 June were clear as to what was required from the Claimant (and as found by this Tribunal in its judgment), but the Claimant remained in material non-compliance up the final hearing dates of 29 and 30 July, when that matter was dealt with by way of a preliminary issue at that hearing, resulting in her claim being dismissed. As a consequence, however, the Respondent was obliged to prepare for that two-day final hearing, in the event that its application failed. Represented by counsel, it attended the hearing, ready to proceed and with its six witnesses in attendance.

c. The seriousness and significance of the Claimant's failure to comply with case management orders cannot be overstated and was at the highest end of the scale of default. She had failed, by 29 July, to present any evidence that would permit the Tribunal to consider whether there was any substance to her claim, or by which it could determine remedy. If the application had failed and the hearing had proceeded, it could not have done so without adjournment, wasting Tribunal resources, due to the shortfalls in the evidence provided.

d. No explanation has been provided by the Claimant for her failure to comply and there are none that are reasonable or credible. It is the Respondent's belief that the Claimant was deliberately choosing not to comply, as to do so would have exposed the fact that the Respondent's principal reason for dismissing her (that while still employed, she was assisting the setting up of a competitor business, for whom she then went to work) was an entirely valid one and which fact she wished to hide from the Tribunal.

e. The Claimant was put on notice, on 25 June, of the Respondent's intention to seek a costs order.

f. While the Respondent wished, on a purely commercial basis, to engage in 'without prejudice' settlement discussions, it was difficult to do so due to the Claimant's non-compliance and when written overtures were made, she disclosed such correspondence to the Tribunal, or referred to it in witness evidence.

g. She also persisted in seeking remedies not within the Tribunal's jurisdiction, to include an 'apology', the commutation of her dismissal into a 'resignation' and seeking damages for the 'way she was treated', which was unreasonable and obstructive behaviour.

h. In these circumstances this is a paradigm case for the award of costs.

9. Claimant. The Claimant responded as follows:

a. In preparing and bringing her case she relied upon the advice of '*a very kind retired trade unionist'* and in particular his '*wrongful and antiquated belief that ACAS would prepare my claim, which obviously they did not ..'*.

b. The '*para-legal firm'* that represented her at the hearing did not prepare any of the case, '*as they were not instructed by me at the time'*.

c. That she does '*not feel it fair upon the court for me to quote being a LIP in the matter of costs. I was criticised for this by Judge O'Rourke in his note of Judgment and I have taken all this on* board'. (It's not quite clear what is meant by the Claimant in this respect, but the reference in the Judgment was that such pro-forma case management orders are issued to thousands of litigants in person every year and are complied with, nonetheless.)

d. She cannot afford to pay a costs order and her health is also a factor. In this respect, she provided the following evidence:

   i. A letter of 24 September from the Royal Orthopaedic Hospital NHS Trust, confirming an appointment for what an accompanying leaflet indicated was a biopsy. She stated that this meant that she would '*need to be off work to recover before my major operation for my condition'*.

   ii. Three Santander Bank bank 'account summaries' in her name, for June to August, showing average monthly payments in of between £3000 and £4000, with average balances of £1-2,000.

10. Respondent's Counter-Submission. The Respondent further responded, in summary, as follows:

a. The Claimant does not seek to deny that her failure to comply was deliberate. The only reason she advances is the '*patently absurd'* suggestion that she thought ACAS would prepare her case for her.

b. In respect of the Claimant's ability, or otherwise, to pay any costs, even on the limited evidence, in the form she has submitted, she can clearly afford to pay some significant part of the Respondent's costs. She has not provided any evidence of her outgoings, which clearly she could have easily done, by providing copies of her full bank statements, but has chosen not to do so. She has provided no evidence as to savings, or capital assets. Based on her past behaviour, she is again failing to make proper disclosure. Also, while still employed by the Respondent, she had two other bank accounts, used for salary payments, but she has provided no evidence in respect of these.

c. As to her medical condition, apart from knowing that she was to undergo a procedure on 29 September, no evidence has been provided as to the details of that procedure, or how long she may need to recuperate, or whether she will actually lose income as a consequence.

Conclusion

11. In failing to comply with Tribunal orders, in particular an 'unless' order, leading the Respondent to have to prepare for and attend a full merits hearing, which was not in the end needed, as her claim was dismissed, for non-compliance, she had clearly behaved unreasonably, within the scope of Rule 76(1) and also 76(2).

12. While conscious that an award of costs in the exception rather than the rule in Employment Tribunal proceedings, I go on to find that nonetheless this is case where it would be appropriate for me to exercise my discretion to make such an order and I do so for the following reasons:

    a. The Claimant consistently and almost certainly deliberately withheld the disclosure requested by the Respondent because she realised that to do so would damage her claim and potentially justify her dismissal (and she does not seek to deny that allegation of the Respondent's in her response to their application). That is entirely contrary to the duty imposed on litigants, in case management orders, to disclose all relevant material, regardless of whether it disadvantages them, or not. It also indicates that she will have likely known, from the outset that her claim was misconceived and had no reasonable prospects of success, if the true position came out. This is, I consider, vexatious and unreasonable behaviour on her part, bringing a claim that she is likely to consider had little merit, in the hope of inconveniencing the Respondent, or extracting some settlement from them.

    b. To maintain that position through to a final hearing, despite having been clearly told what was necessary to comply, is the definition of unreasonable behaviour.

    c. I don't consider that the quality of her representation is a decisive factor, as, clearly, from her correspondence, she is an educated person and it would have merely been necessary, as many litigants-in-person do, to read the orders made (particularly when clarified in correspondence by the Respondent) and comply with them. No legal expertise or experience was necessary to do so. I note also that while she may not have instructed the para-legal firm who represented her at the hearing, until latterly, it is difficult to imagine that their advice would have been anything other than to comply, even if belatedly, with the orders. While implausible, even if she believed that ACAS were going to prepare her claim, any such belief does not lessen the requirement on her to comply with Tribunal orders.

Amount of Costs Order

13. The Respondent states that it has incurred costs of plus of £29,000, inclusive of VAT (which it cannot recover), but is willing to limit its application to the sum of £20,000, in order that they can be summarily assessed by the Tribunal under Rule 78(1)(a). It has provided a schedule of those costs, including

counsel's fee note, with its application. On reviewing that schedule, I have the following comments:

a. The hourly rate claimed for the fee-earner who carried out the bulk of the work is £22 over the Solicitors Guideline hourly rates for London band 2. In any event, I query if a matter involving a relatively straightforward unfair dismissal claim merited their involvement, at least to such an extent and whether a more junior fee-earner may have been appropriate. If so, that person's hourly rate would have been £289. I have no reason to seek the challenge the amount of time spent on this case, particularly in view of the repeated applications made, but consider that approximately 75% of the claimed time could have been carried out by a more junior fee-earner, with input/supervision of 25% from the more senior one. Accordingly, therefore, of the seventy hours claimed, I assess that 17.5 can be paid at £373 per hour (£6527) and 52.5 at £289 per hour (£15,172) – which nonetheless takes the costs claimed to in excess of £20,000.

b. Counsel's fees are entirely routine for a matter such as this and of course she had to be briefed (and therefore paid) for a potential two-day hearing.

14. On the basis that costs orders are intended to compensate the party for having incurred them and it is clear that the costs claimed were legitimately expended and are nonetheless now limited to £20,000, then that is the appropriate amount to order.

Ability to Pay

15. In respect of that sum, I went on to consider the Claimant's ability to pay it. Despite her having been warned by the Tribunal that she was required to '*provide evidence as to your ability, or otherwise, to pay any such order that might be made. Such evidence may include copies of bank statements, documentary evidence of current earnings and outstanding debts or major outgoings*' she has provided very little upon which I can make a valid assessment. She has provided only three summary statements, which indicate reasonable monthly income, but no evidence whatsoever as to that income's source, or of any outgoings or debts, or savings or property ownership. I consider, again that she is being selective as to what she chooses to disclose. I can come to no assessment in respect of the medical evidence she has provided, as there is no indication of the length of any likely recuperation that might be needed, or whether or not she would be paid during it. I consider, therefore, that I have taken as much account as is possible of the Claimant's ability to pay, but conclude, applying **Arrowsmith** that the Claimant is likely, if not now, then in the future, to have the ability to pay costs in the sum ordered, for the following reasons:

a. She is an educated and skilled individual (as evidenced by her past employment with the Respondent), is of working age and can, therefore, it must be assumed, continue to earn a reasonable salary;

b. It is the case that no matter what order is made by this Tribunal, the Respondent will be unable to 'get blood from a stone': if the Claimant genuinely does not have the funds, then she cannot be forced to pay. In that event, it will then be open to the Respondent to consider enforcement through the County Court, in which process the Court can order her to attend, with documents, to satisfy itself as to her means and to then make a repayment order, taking into account her genuine ability to pay.

16. Conclusion. I conclude, therefore, for the reasons set out above that the Claimant is ordered to pay the Respondent's costs, in the sum of £20,000.

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Employment Judge O'Rourke
Dated 13 October 2021

Judgment and Reasons sent to the parties on:

1 November 2021.

For the Tribunal: THY