EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Ms Grace Yearwood **v** **The Department for Work and Pensions**

Heard at: Watford **On**: 18-19 August 2021

Before: Employment Judge Alliott
Members: Mrs J Smith
Mr M Bhatti, MBE

Appearances

For the Claimant: In person (assisted by Ms Judith Ibe (Solicitor))
For the Respondent: Ms Emma McIlveen (Counsel)

JUDGMENT

The judgment of the tribunal is that:

1. The respondent is ordered to pay the sum of £12,500 as a penalty to the Secretary of State.

2. The respondent is ordered to pay the claimant's costs incurred after 2 September 2020, to be subject to detailed assessment if not agreed.

REASONS

Penalty

3. Paragraph 12A of the Employment Tribunals Act 1996 provides as follows:-

> "12A Financial penalties
>
> (1) Where an employment tribunal determining a claim involving an employer and a worker –
>
> (a) concludes that the employer has breached any of the worker's rights to which the claim relates, and
>
> (b) Is of the opinion that the breach has one or more aggravating features,

> The tribunal may order the employer to pay a penalty to the Secretary of State (whether or not it also makes a financial award against the employer on the claim".

4. We have determined that the respondent has breached the claimant's worker's rights.

5. We have made a financial award of £25,000 to the claimant. Pursuant to s.12A (5) the penalty shall be 50% of that amount, namely £12,500.

6. The respondent is clearly able to pay.

7. As per the IDS Employment Law Handbook Practice and Procedure at 20.17:

> "Aggravating features
>
> "aggravating features" is not defined and is left to the discretion of the tribunal. According to the governments explanatory notes to s.16 ERRA, however, "an employment tribunal may be more likely to find that the employer's behaviour in breaching the law had aggravating factors where the action was deliberate or committed with malice, the employer was an organisation with a dedicated Human Resources Team or where the employer had repeatedly breached the employment right concerned". Conversely "the employment tribunal may be less likely to find that the employer's behaviour in breaching the law had aggravating factors where an employer has been in operation for only a short period of time, is a micro business, has only a limited Human Resources function, or the breach was a genuine mistake".

8. Ms McIlveen, on behalf of the respondent, cited to us two cases, namely First Greater Western Limited v Waiyego, UK EAT/0056/18/RN and Giwa-Amu v Department for Work and Pensions case number 1600465/2017.

9. As per paragraph 105 of First Greater Western Limited:-

> "Section 12A appears to have been little used and, as far as I am aware, has not generated any appellate jurisprudence. It was added by s.16(1) of the Enterprise and Regulatory Reform Act 2013, with effect from 6 April 2013. The explanatory notes accompanying s.16 stated that its purpose is "to encourage employers to take appropriate steps to ensure that they meet their obligations in respect of their employees, and to reduce deliberate and repeated breaches of employment law".

10. In the Giwa-Amu case the tribunal declined to make a financial penalty as it considered that its recommendations would be more effective in ensuring the respondent avoids repeated breaches of employment law. It is ironic that the respondent in that case was the DWP.

11. We find that there were numerous aggravating features of this case. We find that the respondent's conduct was deliberate and that the respondent was an organisation with a dedicated Human Resources Team. We rely on but do not repeat the aggravating factors identified in paragraph 137 of our

reasons. Of particular concern was the management collusion in pretending to be impartial and the disregard paid to the claimant's own procedures and the recommendations and advice from OH and HR.

12. In our judgment, it is appropriate to impose a financial penalty of £12,500 on the respondent to encourage it to take appropriate steps to ensure that it meets its obligations in respect of its employees and to reduce deliberate and repeated breaches of employment law.

Costs

1. On 18 February 2021 the claimant made an application for her costs.

The law

2. Rule 76 of the Employment Tribunal's (Constitution & Rules of Procedure) Regulations 2013 provides as follows:-

> "76 when a costs order… 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 –
>
> (a) A party… has acted…unreasonably in…the way the proceedings (or part) have been conducted: or
>
> (b) any claim or response had no reasonable prospect of success:"

3. Our discretion involves a three-stage process. Firstly, we need to determine whether the jurisdiction is engaged; secondly, if the jurisdiction is engaged, we need to consider whether to exercise our discretion and make an order; and, thirdly, we need to determine how much to award.

4. We take as our starting point that costs are not normally awarded to the successful party against the unsuccessful party.

5. From the IDS Employment Law Handbook at 20.59 dealing with "unreasonable conduct":

> "Unreasonable has its ordinary English meaning and is to to be interpreted as if it meant something similar to vexatious – Dyer v Secretary of State for Employment EAT 183/83.
>
> …
>
> In determining whether to make an order under this ground, an employment tribunal should take into account the "nature, gravity and effect" of a parties unreasonable conduct – McPherson v BNP Paribas (London Branch) [2004] ICR 1398 CA
>
> …
>
> The Court of Appeal in Yerrakalva v Barnsley Metropolitan Borough Council [2012] ICR 420, CA commented that it was important not to lose sight of the totality of the circumstances. The vital point in exercising the discretion to order costs is to look at

> the whole picture. The tribunal has to ask whether there has been unreasonable conduct by the paying party in bringing, defending or conducting he case and, in doing so, identify the conduct, what was unreasonable about it, and what effect it had.
>
> Reasonableness is a matter of fact for the employment tribunal, and it will be difficult to argue that the tribunal has made an error or law unless it can be shown that it has neglected relevant considerations or taken into account irrelevant ones."

Grounds of the application

6. Accompanying the application for costs is a statement that the claimant's costs at that stage were £115,993.40. We observe that that appears to be an extraordinarily high figure and we find it hard to conceive how the claimant can have run up such a bill. In any event, in our judgment, the fact that the claimant has run up a large bill of costs is not a ground for us to make a costs order.

7. We find that the respondent did reasonably engage in settlement negotiations.

8. The original directions required the respondent to indicate whether or not it conceded the disability issue by March 2019. In actual fact it only confirmed that disability remained in issue on 1 October 2019. The respondent contended that the impact statement had been served late by the claimant and that the disclosure was incomplete. In our judgment, the respondent's actions may have been justified and, in any event, did not cause any unnecessary increase in costs. We do not find that that conduct was unreasonable.

9. The claim was originally scheduled to be heard at a 5-day hearing beginning on 14 October 2019. Shortly before that a joint application was made to adjourn the hearing. This was on the grounds that there had been significant delays on both sides in disclosure and in agreeing the contents of a bundle which had a knock on effect on the preparation of witness statements which had only been finalised shortly before and the parties had insufficient time to prepare for the final hearing. We do not find that the respondent's conduct was unreasonable in adjourning that hearing.

10. A further preliminary hearing to determine the issue of disability was directed. That was scheduled for April 2020 but due to the covid lockdown only took place in August 2020.

11. The decision that the claimant was disabled within the meaning of the Equality Act 2010 was sent to the parties on 2 September 2020.

12. The decision of Employment Judge Gumbiti-Zimuto makes plain that the claimant's impact statement left a lot to be desired. In our judgment, it was not unreasonable of the respondent to dispute the issue of disability.

13. In or judgment, at all times up to 2 September 2020 the respondent did not act unreasonably in the conduct of the proceedings and it could not be said that the response had no reasonable prospects of success.

14. However, following the determination on the issue of disability, in our judgment, at that stage, the response had no reasonable prospects of success and to have continued to contest the claimant's claim was unreasonable conduct of the proceedings. At that stage, the respondent had a determination on the claimant's status as disabled and would have had all the witness statements and documentation to hand. We do not reiterate our findings which are set out in the reasons to the judgment. However, it must have been quite clear that the respondent's actions in not allowing the claimant to return to work, disregarding its own procedures and ignoring clear recommendations and advice from OH and HR that the respondent's defence was doomed to failure.

15. Consequently, a costs order in favour of the claimant will be made.

16. We do not have a breakdown of the claimant's costs after 2 September 2020.

ORDERS

1. The claimant is to send a schedule of costs incurred after 2 September 2020 to the respondent by **4pm, 2 September 2021.**

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Employment Judge Alliott

Date: 2/11/2021

Sent to the parties on: 19/11/2021

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For the Tribunal Office

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