Case No: 2300982.2020

EMPLOYMENT TRIBUNALS

Claimant: Ms N Hanis

Respondent: Promo Concepts Ltd

Heard at: Croydon (by cloud video platform) **On:** 15 January 2021

Before: Employment Judge Nash (sitting alone)

Appearances
For the claimant: Ms Nicholls of counsel
For the respondent: Mr Hine, solicitor

JUDGMENT ON COSTS

The respondent shall pay the sum of £1763.40 to the claimant in respect of her costs under rule 76 of the 2013 Employment Tribunal Rules of Procedure.

REASONS

1. The claimant made an application for a costs order under Rule 76 of the 2013 Rules of Procedure. Rule 76 provides as follows:-

   > A Tribunal may make a costs order or preparation time order and shall consider whether to do so where it considers that
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   > (a) a party … has acted vexatiously, abusively, disruptively or otherwise unreasonably in the bringing in the proceedings (or part) have been conducted.

2. The Tribunal with the consent of the parties determined the application on the papers. It considered the original application made on 11.3.21, the respondent's submissions on the costs application and the claimant's further and better particulars of her application. It had sight of documents from the claimant including correspondence between the parties (or their representatives) during proceedings and legal invoices.

3. The Tribunal directed itself in line with the Court of Appeal decision in *Yerrakalva v Barnsley Metropolitan Borough Council and another 2012 [ICR 420]*. This reminds Tribunals that costs orders in the Employment Tribunal are the exception not the rule. Tribunals are reminded that they are not a costs jurisdiction. In the courts, a losing party is normally expected to pay the winning party's costs as a matter of course. This is known as costs following the event. Parliament specifically created the Employment

Tribunal without this. Nevertheless, it has given Tribunals the power to make costs orders.

4. In the Court of Appeal in *Yerrakalva* also reminded tribunals not to lose sight of the totality of the circumstances. The vital point in exercising the discretion to award costs is to look at the whole picture. Tribunals must ask whether there has been unreasonable conduct by the paying party in bringing or conducting the case, and in doing so, identify the conduct, what was unreasonable about it and what effect it had?

5. The Court of Appeal also, in the case of *McPherson v BNP Paribas (London Branch) 2004 [ICR1398]* instructed Tribunals to have regard to 'the nature, gravity and effect of a party's unreasonable conduct.'

6. The Tribunal accordingly had to decide three issues:-

    - Firstly, was its discretion to award costs triggered under Rule 76?
    - Secondly, if so, should that discretion be exercised?
    - Thirdly, if so, how much should be awarded?

7. The claimant's application was based on the contention that the respondent's conduct of the proceedings was unreasonable.

8. The claimant's application listed 10 occasions on which her lay representative (her future father in law) requested information from the respondent to progress the case. However, the claimant confirmed that she was not seeking a preparation time order in respect of this.

9. The second ground of the costs application was the respondent's conduct during the liability and remedy hearing. It was said that the conduct was "chaotic and disorganised" including the missing of return dates on tribunal orders. Further:-

> "The vacillating position in respect of the claim for commission and notice pay; the Respondent's case changed countless times during the course of the liability hearing about whether it accepted the Claimant was entitled to commission for December 2019 and January 2020 or was not.
>
> Similarly, the Respondent's position on notice pay changed countless times during the course of both evidence and submissions. The Claimant was constantly having to adapt to a changing position, including the provision of last-minute Excel spreadsheets. Whilst it is accepted and acknowledged that parties frequently seek to rely on documents at the last minute, the manner in which they were presented to the Tribunal and Claimant was unacceptable."

10. In the further and better particulars, the grounds for the costs application was less easy to ascertain. However, the tribunal understood the grounds to be the same – the delays in the respondent's progress of the litigation. Although the respondent contended that the claimant did not seek costs on the basis that the respondent's defence of the claims was in itself unreasonable because the defence had little grounds of success, the tribunal did not accept this interpretation of the costs application and further

particulars. The tribunal found that this was the crux of the further particulars. In respect of the contract claims, the contention was explicit.

11. A further ground of the application appeared to be that the respondent had not accepted the claimant's offers of settlement. However, as the respondent pointed out in its submissions, the claimant was awarded £22,714.81 by the tribunal. This was less than the claimant's settlement offer. The claimant's offer was not stated in terms to be without prejudice save as to costs. However, the respondent did not object to the tribunal considering this correspondence.

12. The further particulars made reference to matters occurring after the handing down of the remedy judgment, in particular attempts at enforcement. The tribunal did not take this into account.

13. The tribunal firstly considered if this conduct of the respondent in preparing for the hearing and in respect of tribunal directions amounted to unreasonable conduct. The tribunal agreed with the claimant that the respondent's way of running the litigation was less than ideal. However, this is regrettably a very common problem in employment tribunal cases. As the respondent stated in its submissions

> "In *Salinas v Bear Stearns International Holdings Inc and another* [2005] ICR 1117, Burton (P) expressed the view that costs orders were not made in the vast majority of tribunal cases because of the high hurdle that has to be overcome for a costs order to be made."

14. This has not changed materially since 2005 so the tribunal accepted that the case remained good authority. Accordingly, the respondent's conduct, whilst less than ideal did not reach the threshold of unreasonableness necessary to trigger the tribunal's costs jurisdiction. At the end of the day, the case was ready for hearing and the hearing proceeded without undue incident.

15. The tribunal did not find the respondent's defending the unfair dismissal case to be unreasonable. A respondent is entitled to test a claimant's case. The respondent put forward a coherent legal defence. The claim was for automatic unfair dismissal and it can be genuinely difficult for parties to foresee the result in such cases. There are risks in litigation and the respondent did not act unreasonably in taking this defence to the tribunal.

16. The same applied to the claim for holiday pay. Holiday pay claims can be extremely complex and some involve European law. It would require a very clear cut case for a respondent to act unreasonably in requiring a claimant to make out a holiday pay claim before a tribunal.

17. However, the tribunal found that the respondent's conduct in defending the commission contract claim was unreasonable for the following reasons. As stated in the reasons for the liability judgment, the tribunal found the respondent's evidence as to commission profoundly unsatisfactory. The tribunal found that the respondent's case kept changing and it required close questioning by the tribunal to ascertain what the respondent was saying. The respondent's case changed from evidence given on oath and the tribunal determined that it could not rely in any material way on the

respondent's evidence. The respondent sought to introduce new evidence during the hearing in the form of a spreadsheet and the tribunal did not accept that there was good reason for this.

18. The respondent's conduct of the commission contract claim accordingly went beyond what would be reasonable for an employer to dispute an employee's entitlement to commission.

19. The only issue before the tribunal at the hearing in respect of the wrongful dismissal claim was the amount of a week's pay which was determinant on how much commission should be included. Accordingly, it turned in the most part on the same facts as the commission contract claim.

20. The tribunal went on to consider if it should exercise its discretion to make a costs award in respect of the commission claim. The tribunal found that it was. The respondent had not contended that it was unable to pay any costs award. The respondent was represented. The claimant had limited her claim under the commission claim to less than she might have claimed.

21. Thirdly, the tribunal went on to determine how much should be awarded. It was difficult to know how much of the claimant's legal fees were attributable to the commission claim, rather than the other claims. The claimant provided no breakdown. The respondent made no submissions on this.

22. Whilst it was unlikely that the costs of preparing and dealing with the commission claim were exactly proportionate to the quantum, this gave the tribunal at least some guide to the importance of the commission claim in relation to the other claims and accordingly how much time was devoted to this claim.

23. The contract claim award made up a little over 10% of the total, including ACAS adjustment. As the respondent accepted that the claimant's total claim for costs was for £6056 for solicitors' fees and £5700 for counsel, the total costs claimed were £11,756.00. Accordingly, the Tribunal awarded 15% of the total award costs claimed, being £1763.40.

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Employment Judge Nash
Date 9 December 2021

Sent to the parties on
Date: 10 December 2021