Case No: 2600235/2020
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EMPLOYMENT TRIBUNALS

Claimants: **Mr G Varga and Mrs E Varga Homa**

Respondent: **Three Pillars Contractors Limited (1)**
Rufford Court Limited (2)

Heard at: **Nottingham** **On: 15 November 2021 in Chambers**

Before: **Employment Judge Butler**
Members: **Mr K Rose**
Mr J D Hill

Application heard on the papers

JUDGMENT ON COSTS APPLICATION

The unanimous Judgment of the Tribunal is that the Respondent's application for costs is dismissed in both cases.

REASONS

The Application

1. These cases were heard together on 8 -12 March 2021. The claims brought by the Claimants were dismissed. Judgment was sent to the parties on 27 April 2021 and the Respondent's application for costs in both cases was made on 20 May 2021 so was in time under rule 77. Briefly, the applications against each party concentrated on the notification that costs would be pursued if the Claimants proceeded to the hearing as their claims had little prospects of success, late disclosure of evidence had made it necessary to prepare a supplemental statement on behalf of the Respondents, and the Claimants' evidence was unreliable in parts and they had misunderstood or misinterpreted the legal position and pursued claims which ran contrary to the evidence given at the hearing.

The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (the rules)

2. Rule 76 provides:

(1) A Tribunal may make a costs 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; or

(c) ….

The Evidence

3. We heard no evidence. The Claimant asked for the applications to be heard on the papers but the Respondents requested an attended hearing as evidence from the Claimants as to their means would be necessary if the applications were successful. However, it was made clear to the Tribunal that the Claimants did not propose to attend since their claims had been union financed and any costs order would be met by the union. Accordingly, the hearing proceeded on the basis of written submissions and was decided on the papers.

The Law

4. We were referred to the following cases:

Barnsley Metropolitan Borough Council v Yerrakalva [2012] IRLR 78

McPherson v BNP Parabas (London Branch) [2004] IRLR 558

Raggett v John Lewis Plc [2012] IRLR 906

Gee v Shell Ltd [2003] IRLR 82

Peat v Birmingham City Council UKEAT/0503/11

Submissions

5. We carefully considered the submissions before us but do not repeat them here.

Discussion and conclusions

6. As the Tribunal noted in the judgment, the Claimants are Hungarian. Mr Varga had the benefit of an interpreter but Mrs Varga Homa did not, although she would doubtless have had some benefit from the translation of the proceedings as they affected her husband. Mr Varga certainly needed the services of an

interpreter and this may also have been useful for his wife. Both Claimants struggled to express themselves on occasions.

7. In considering whether to award costs against the Claimants in this case, we applied specific legal principles as well as the rules. We consider them in the following paragraphs. In doing so, we consider some of the submissions of Ms Barry for the Respondents and the Claimants' submissions (although we do not know the identity of the author).

8. Ms Barry rightly pointed out that we must first decide whether the power to award costs under rule 76 has been triggered and then whether in our discretion we should make a costs order. The Claimants' submissions point out, inter alia, that costs in the Tribunal should be the exception (**Gee**).

9. We do not place any reliance in this case on the pre-hearing correspondence between solicitors. It is, of course, fairly common practice for the Respondents' solicitors to suggest that costs will be an issue if the Claimant does not withdraw or accept a specific sum of money. Our problem with the correspondence quoted to us in submissions is that there appears to be some fault on both sides. Mrs Varga Homa submits that she and her husband were dismissed as a result of her original claim. She admitted in evidence that there was no work for her to do after the bed and breakfast business ceased. However, having noted this, we were also only provided with minutes of the relevant board meeting at which this decision was made during the hearing. Our view, in the round, is that Mrs Varga Homa did not have the "smoking gun" evidence from the Respondents when deciding to pursue her claim; neither did her solicitors despite suggesting there was no such evidence.

10. In **Raggett,** the Employment Appeal Tribunal held that one of the matters to be considered in determining whether there has been unreasonable conduct by the paying party is the conduct of the party making the application. In this case, it was perhaps poor judgment on the part of the Respondents to have threatened costs when they had not produced the board minutes as evidence that the redundancy had been previously been approved by the board. There is also the fact that the Respondents were part of a group of family companies which even one of their HR advisers said in evidence she did not know. This would have been confusing for the Claimants. Even though we found that the decision to make the redundancies was taken before receipt of Mrs Varga Homa's claim, it would have been a simple matter for the Respondents to produce the board minutes well before the hearing. Without this hard evidence, we do not consider it was unreasonable for the Claimants to pursue their claims.

11. Mr Varga clearly struggled with the legal principles involved in his claim but, since it rested significantly on his wife's claim, the issues surrounding her claim are also relevant to his and the principles discussed above assume some relevance. Whilst we formed the impression that Mr Varga's claim lacked merit, we could see how he was confused by the sudden lack of work available to him. We found his English to be poor as was his grasp of the legal principles involved in his claim.

12. In deciding whether to exercise our discretion to award costs, we have taken into account all of the above matters. The Claimants also make the point that, if

the Respondents were firmly of the view that pursuing the claims was unreasonable, they could and should have made an application for a deposit order (or strike out). The fact is that many of the issues around the reasonableness of the claims only came to light during the hearing itself. Paramount amongst these was the Respondents' very late production of the board minutes.

13. In all the circumstances, therefore, we do not consider that the threshold under rule 76 has been met and do not exercise our discretion to award costs. We make this decision following the principles in **Barnsley MBC** by looking at the whole picture of what happened in these cases. Further, quoting from our judgment, "(the Claimants) appear to have misinterpreted or misunderstood the legal position….". This does not satisfy the rule 76 threshold and we do not consider it in the interests of justice to award costs against the Claimants.

Employment Judge Butler

Date 14 December 2021