



EMPLOYMENT TRIBUNALS

Claimant: Ms Jacqueline O'Donnell

Respondent: Pareto Retail Ltd t/a Bargain Booze

COSTS JUDGMENT

The respondent's application for costs is refused.

REASONS

The application and issues

1. Following the hearing of the substantive claim of unfair dismissal on 6 and 7 September 2021, the parties prepared closing submissions in writing. Thereafter, the Tribunal promulgated a reserved judgment dismissing the claim. Along with the closing submissions, the respondent made an application for costs on the basis that the claimant and/or her representatives acted vexatiously or otherwise unreasonably.
2. The issues for the tribunal are:
 - 1) Whether these grounds are established;
 - 2) If so, whether in the tribunal's discretion it ought to make a costs order; and
 - 3) If so, in what amount.

Evidence

3. The Tribunal had before it the following:
 - a. A Case Management Summary dated 21 May 2020
 - b. A Case Management Summary dated 10 December 2020
 - c. A letter from the claimant's representative dated August 2021 including the document "Claimant's Heads of Claims/List of Issues as at 20/8/2021".
 - d. A 6 paged bundle from the respondent's representative, which includes the document "Respondents Final Updated List of Issues/Head of Counter-Claim".

- e. A 128 paged bundle of documents
 - f. Email from Wirral Borough Council regarding the Designated Premises Supervisor, dated 29 October 2019
 - g. The claimant's closing submissions
 - h. The respondent's closing submissions
 - i. The respondent's costs submissions
4. Costs submissions were not sought from the claimant as it was apparent to the Tribunal that there was no prospect of the respondent overcoming the initial hurdle of demonstrating vexatious or unreasonable behaviour.

Respondent's Costs Submissions

5. The following sets out in brief the respondent's case.
6. Phoenix solicitors, who acted for the claimant, did not consider the respondent's counterclaim. They acted aggressively in pursuing a weak case on a "no-win, no-fee" basis. They harassed the respondent in attempting to settle the case and this was unfair particularly as the respondent is a Small to Medium Enterprise (SME) and defended the case without professional representation. Additionally, they tried to persuade the respondent to disregard potentially relevant evidence of National Lottery control compliance and they inaccurately said they would use Counsel at the hearings.
7. Phoenix also said that the respondent was in breach of confidentiality and GDPR obligations, yet they were in breach themselves by including private and confidential correspondence in the hearing bundle. They were obstructive in refusing to produce a time-line document relating to the opening of the claimant's own store and they were apparently amused by the respondent's director, Mr Adrian Costain, holding himself out as a "Fair Dealing" activist for SMEs.
8. The claimant's evidence was contradictory and inaccurate, particularly with respect to her removal as Designated Premises Supervisor at the respondent's Prenton store, and the timeline she produced relating to the opening of her own store. It is likely that she was coached by Phoenix to be "extremely economic with the actuality" in giving evidence under oath.
9. The respondent has offered to donate any costs awarded to a small local charity.

The Law

10. The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (the Regulations) contain a discretionary power to award costs and the relevant rules are set out in Schedule 1 rules 74 to 84.
11. The circumstances in which a Costs Order may be made are set out in rule 76. The relevant provision here is rule 76(1) which provides as follows:
- "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;

12. The amount of a costs order is set out in 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.....

13. Rule 84 concerns ability to pay and reads as follows:

“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.”

14. It follows from these rules that there is a three stage procedure to consider (see paragraph 25 of *Haydar v Pennine Acute NHS Trust* UKEAT 0141/17/BA). The first stage is to decide whether the threshold has been reached for a party's conduct to fall within rule 76(1), whether by way of unreasonable conduct or otherwise; if so, the second stage is to decide whether it is appropriate to make an award; and if so, the third stage is to decide how much to award. Ability to pay may be taken into account at the second and/or third stage.

15. An award of costs is the exception rather than the rule in Employment Tribunal proceedings; that was acknowledged in *Gee v Shell UK Limited* [2003] IRLR 82.

16. In *AQ Ltd v Holden* [2012] IRLR 648, The Employment Appeal Tribunal held that a tribunal should not judge a litigant in person by the standards of a professional representative. Lay people were likely to lack the objectivity and knowledge of law and practice brought by a professional legal adviser.

17. At the second, discretionary stage, when deciding whether unreasonable conduct should result in an award of costs, the Court of Appeal held in *Barnsley Metropolitan Borough Council v Yerrakalva* [2012] ICR 420 that the tribunal should have regard to the nature, gravity, and effect of the conduct. The vital point in exercising discretion is to look at the whole picture, and in doing so to identify the conduct, what was unreasonable about it and what effects it had.

18. The meaning of the word, “vexatious” has been the subject of a number of reported cases. In *Attorney General v. Barker* [2000] 1 FLR 759, Bingham CJ described the hallmark of vexatious proceedings as being that it had:

“Little or no basis in law (at least no discernible basis); that whatever the intention of the proceeding may be, its effect is to subject the

defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant; and it involves an abuse of the process of the court, meaning a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process”.

19. In *Ashmore v. British Coal Corporation* [1990] ICR 485 the Court of Appeal observed that whether a case was vexatious depended on all the relevant circumstances of the case.
20. In *ET Marler Ltd V Robertson* [1974] ICR 72, NIRC the National Industrial Relations Court stated that *“If an employee brings a hopeless claim not with any expectation of recovering compensation but out of spite to harass his employers or for some other improper motive, he acts vexatiously.”*

Conclusions

21. As was made clear at the final hearing and in the Tribunal’s Reserved Judgment, the respondent was not entitled to make a counterclaim, as the claimant was not pursuing a breach of contract claim, which is a prerequisite to considering a counterclaim. Therefore, there was nothing unreasonable about the claimant’s solicitors not engaging with the respondent’s purported counterclaim.
22. Whilst the claimant’s solicitors may have vigorously pursued their client’s case and tried hard to settle it before the final hearing, they were entitled to do so. The fact that the respondent is an SME, unrepresented at the final hearing, is no bar to this. As for the National Lottery issue, this was not a matter that warranted consideration at the final hearing and, in the event, the solicitors were not unreasonable in suggesting that it should be disregarded. Whereas Counsel did not represent the claimant at the final hearing, she was represented by an Employment Consultant. There may have been some confusion in giving the status of her representative, but this cannot be vexatious or unreasonable behaviour.
23. With respect to the GDPR matter, including private and confidential documents in a Tribunal Hearing bundle does not breach the regulations. As for the claimant’s solicitors saying that the respondent was in breach of GDPR, there is no corroborative evidence before the Tribunal to suggest that this was said. In any event, in the context of this case, it has not been demonstrated how it could be unreasonable or vexatious.
24. Regarding the requested timeline, it was a matter for the claimant’s solicitors to determine what evidence they wished to produce, and not producing such a document cannot be said to be obstructive. Furthermore, there is no evidence before the Tribunal to support the contention that the claimant’s solicitors were amused by Mr Adrian Costain thinking of himself as a “Fair Dealing” activist for SMEs.
25. Turning to the claimant’s evidence, even if there were some contradictions or inaccuracies, memories can fade and this, in itself, does not suggest that the claimant was unreasonable or vexatious. Moreover, there is no evidence to support the contention that the claimant was coached in the way she gave evidence on oath. Although the claimant did not succeed

with her claim, she had an arguable case and it was not unreasonable for her to bring it in the Tribunal.

26. Although the respondent has offered to donate any costs awarded to a local charity, this cannot be taken into account in determining whether there has been vexatious or unreasonable behaviour.
27. Consequently, for the reasons given above, the tribunal finds that the threshold required by the rules to demonstrate vexatious or unreasonable behaviour has not been reached. Therefore, the respondent's application for a costs order fails at the first stage and there is no need for the Tribunal to consider the second or third stages of the process.

Employment Judge Liz Ord

Date 7 January 2022

JUDGMENT SENT TO THE PARTIES ON

14 February 2022

FOR THE TRIBUNAL OFFICE