



EMPLOYMENT TRIBUNALS

Claimant: Ms N Izaddoust

Respondent: Alliance Medical Limited

Heard at: Liverpool (by video hearing)

On: 19 April 2022

BEFORE: Employment Judge Shotter (by CVP)

Members: Ms L Atkinson
Mr P Northam

Representatives

For the claimant: In Person

For the respondent: Ms Rezaie (Counsel)

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is:

1. The claimant is ordered to pay a contribution towards the respondent's legal costs in the sum of £6000 (six thousand pounds).

REASONS

Preamble

1. This is a hearing to determine the respondent's application for costs as set out in the solicitors letter dated 13 May 2021 following the liability hearing that took place on 12-16 April 2021 when the Tribunal gave oral judgment and reasons, and the earlier hearing held on 2, 3 and 4 March 2021. The parties had originally agreed the issues to be decided which are as follows;

- 1.1 Did the Claimant's case have reasonable prospects of success?

1.2 Did the Claimant act unreasonably in bringing and/or conducting the claim?

1.3 Did the Claimant act disruptively in conducting the claim?

1.4 If the answer to any question at paragraphs 1.1, is no and 1.2 or 1.3 above is yes, should the Claimant be required to pay some element of the Respondent's costs?

1.5 If so, what element?

2. The Tribunal has taken into account the judgment and reasons sent to the parties on the 18 March 2021 and the typed judgment and reason following the liability hearing that were read out to the parties on the 16 April 2021 followed by the judgment only being sent to the parties on the 21 April 2021 together with a Record of Preliminary Hearing that included case management orders. It is notable the claimant has not complied fully with the case management order set out at paragraph 2 in that she failed to provide a statement of means although a breakdown not in statement format was provided with no explanation given. Further, incomplete bank statements disclosed required for this costs hearing were provided, and the claimant has not given a satisfactory explanation for this. Throughout this litigation claimant ignored case management orders, deflected questions and was found by the Tribunal not to have given credible evidence.

The adjourned liability hearing and strike out application

3. The claimant did not attend the first day of the liability hearing on 2 March 2021 and the respondent's application to strike out the claimant's claim was refused. Judgment and reasons sent to the parties on 18 March 2021 included reference to the claimant orally seeking to include a new allegation of rape without making a formal application to amend. The claimant maintained at the costs hearing she had not made an application to amend her claim to introduce a rape allegation because she had not been raped. The claimant's honesty was fundamentally undermined by the retraction of the rape allegation, both in respect of her credibility and decision to intentionally deceive the Tribunal by introducing a serious allegation that had not taken place in an attempt to bolster up complaints of serious sexual harassment which it found, had also been fabricated.

4. The Tribunal unanimously found the manner in which the claimant's rape allegation was raised was scandalous and vexatious, and the manner in which the proceedings conducted has been scandalous, unreasonable and vexatious. The claimant failed at every turn to comply in time or at all with Employment Tribunal orders and directions, having ignored all correspondence from the Tribunal and the Respondent since 4 February 2021 and despite the Tribunal finding against her, and the seriousness of the costs application against her for legal costs that totalled £134,532.00 the claimant ignored correspondence and case management orders that resulted in substantial additional costs being incurred by the respondent's solicitors. The claimant was sent and received the strike out warning which resulted her witness statement being produced for the liability hearing and when asked to explain the reasons, the claimant gave contradictory and unintelligible information concerning when it was first produced. The claimant's behaviour resulted in the trial being adjourned and this also resulted in additional costs being incurred by the respondent. It is notable the

claimant has not produced any statement for this costs hearing and failed to produce all the relevant evidence as to her income.

The liability hearing

5. At the liability hearing the Tribunal found the claimant was not found to be a credible witness and she was an inaccurate historian. She embellished and contradicted her own evidence maintaining that some incidents took place on separate dates only to change her evidence; she gave specific dates for incidents only retract on cross-examination and the claimant attempted to introduce an allegation of rape at the last hearing together with other allegations that had not been raised before. The Tribunal was satisfied on the balance of probabilities that the claimant was dismissed during her probation for a poor attendance record and poor performance which she had failed to improve, and there was no causal link with either (a) the claimant being in a new relationship (which she was not) and (b) sexual harassment that had not taken place at any stage during the claimant's employment.

6. When deciding the issue on the amount of costs to be paid by the claimant the Tribunal firmly put out of its mind punishing the claimant for her conduct and the vexatious manner in which she has ran this case.

Witness evidence at costs hearing

6 The Tribunal heard oral evidence from the claimant, who confirmed she was a doctor and should be referred to as such. She confirmed her partner, Dr Patel, was unemployed, no longer a dentist with his own practice and money flowed in and out of their accounts by way of alleged loans and re-payments of loans including from Dr Patel's mother and the mosque who had allegedly lent the claimant £3000 in total. The claimant, despite the discussion around the steps she would need to take for this cost hearing and the case management order made on the 14 April 2021 made with the agreement of the parties, failed to comply. Further, the claimant agreed to and was aware the costs hearing would take place via CVP, which she attempted to adjourn a short time before the hearing on the basis that following a back operation the claimant could not travel to the Tribunal.

The respondent's application

7 With reference to paragraph 2.2(a) the Tribunal accepted the Ms Razaie's submissions to the effect that the claimant's allegations of sexual harassment were spurious and changed in nature becoming more serious as the litigation progressed. The allegations developed despite the claimant's knowledge that the sexual harassment had not occurred, for example, the claimant knew rape had not taken place as admitted by her today. It is notable in oral submissions the claimant attempted to downplay this admission asserting she could still feel "his filthy hands on me." The claimant may have taken the unrealistic view she had a reasonable chance of success, but she clearly felt the need to bolster up her allegations by a very serious allegation which could have destroyed a man's career and life. There was no reasonable prospect of success from the outset, and if the Tribunal is wrong on this point the claimant acted in a disruptive, vexatious and otherwise unreasonable manner in bringing the proceedings. The Tribunal took the view the claimant deflected questions, did not cooperate with the

respondent, the Tribunal and Ms Rezaie in the hearings, for which the claimant has again today apologised.

The claimant's evidence

8 The claimant is unemployed with 2 children in receipt of Universal Credit totaling £1,446.68, child benefit £140.60 and child maintenance which according the claimant's evidence averaged £100 per month.

9 The claimant produced bank statements, and in breach of the case management orders she disclosed the existence of two accounts when there is a third, which the claimant stated showed a zero balance but this could not be confirmed in any document. Disclosure was incomplete and there were issues with the claimant's current account. For example, in the savings account, there were regular payments out to Dr Patel which exactly correlated to money received by the claimant leaving a zero balance on the same day the monies were received into the account and paid out to Dr Patel. The payments made to Dr Patel ranged from £50 to £1,920 and against the description was the "ref: loan" to Dr Patel. From 1 December 2020 to 27 October 2020 the claimant had received and transferred at least 23 payments to Dr Patel, not including cash withdrawals.

10 The current account reflects on the 1 February 2022 the claimant received £3000 from Dr Patel which she stated was transferred into her savings account. The savings account does not reflect this transaction. There is no transfer of £3000 from the claimant's current account to her savings account, and the claimant was unable to give a satisfactory explanation. The claimant refused to divulge the fact Dr Patel remained her partner, until she was instructed by the judge to clarify the position. She agreed the £3000 left her account and explained "it's for a different affair, not for me...or someone went to the bank to get the cash." This evidence was not reflected in the bank statements, and when pressed the claimant's explained it was for food "sometimes" and contradicting herself stated "not for children and food, but rent" and the £3000 was paid into the savings account. The evidence was unsatisfactory, pointed to an inadequate disclosure by the claimant and the impression that she is concealing another stream of revenue. It is not for the Tribunal to determine whether the claimant is aligning her bank account to ensure she received Universal Credit; it is not experienced in forensic accountancy and whilst Ms Rezaie cross-examined and made submissions on this point, the Tribunal concluded the claimant's evidence cannot be relied upon when it comes to the evidence setting out means.

11 In oral submissions the claimant explained for the first time she had entered into an Individual Voluntary arrangement ("IVA") in 2018. The claimant did not give evidence of this under oath, and Ms Rezaie submitted the Tribunal could not take it into account, because this was the first time it had heard about it. The Tribunal did not agree. The claimant's summary reflects Credit Fix £85 per month, which the claimant did not explain despite a case management order that she provide a witness statement. The claimant had other outstanding loans, including a private arrangement with the mosque and the Tribunal is unaware of any specific details, for example, how long the IVA has to run, it is nevertheless relevant. It is apparent from the bank statements the claimant made a payment to Credit Fix in February and March 2022 and the IVA is continuing.

12 It is not disputed the claimant's rent is £750, and the amount is reflected in the bank statements. The claimant disclosed no information from the DWP on how her means were assessed and the Universal Credit amount of £1446.68 calculated. It is apparent the claimant was also in receipt of a DWP payment on 3 March 2022 in the sum of £387.78. If the Tribunal accepted the claimant's evidence on face value it is apparent the claimant is not in a position to pay the respondent's costs, however, it cannot be accepted on face value. The claimant is not a credible witness, and she has referred to only part of the story. It is apparent money was paid in and out her accounts to keep a zero or low balance, when substantial amounts over and above the benefits were received, received primarily from Dr Patel. The Tribunal is not satisfied the claimant has established she cannot afford to pay any costs, and it may be the case that the respondent will fall in line with other creditors when it comes to the costs order, or will have difficulties enforcing a costs order until the claimant manages to obtain employment, but this factor should not be a bar to a costs order being made.

The law

13 It is common ground that the Tribunal has the discretionary power to make a costs order under the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013. Rule 74 defines costs and rule 76 sets out when a costs order may or shall be made.

14 Rule 76(1)(A) provides that: "A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—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 any claim or response had no reasonable prospect of success.

15 The Tribunal can make a costs order of the following descriptions:- (i) an order for a specified sum not exceeding £20,000:

16.1 An order that the whole or a specified part of the costs to the receiving party be determined by way of a detailed assessment carried out by the County Court in accordance with CPR or by an Employment Judge applying the same principles.

16.2 An order to pay another party or a witness a specified amount in respect of necessary and reasonably incurred witness expenses.

16.3 An order for a specific specified sum agreed by the parties.

17 The Tribunal **may have regard** to the paying parties ability to pay (Rule 84) [the Tribunal's emphasis].

18 A Tribunal **must consider** whether to make a costs order against a party where he or she has acted unreasonably in the bringing or conducting of proceedings".

19 Rule 76 of the Tribunal Rules 2013 imposes a two-stage exercise for a Tribunal in determining whether to award costs. First, the Tribunal must decide whether the paying party (and not the party who is seeking a costs order) has acted unreasonably, such that it has jurisdiction to make a costs order. If satisfied that there has been

unreasonable conduct, the Tribunal is required to consider making a costs order and has discretion whether or not to do so. Fees for this purpose means fees, charges, disbursements or expenses incurred – rule 74(1) Tribunal Rules 2013.

20 In Employment Tribunal proceedings costs do not ordinarily follow the event, unlike County Court and High Court actions.

21 When making a costs order on the grounds of unreasonable conduct the discretion of the Tribunal is not affected by any requirement to link the award causally to any particular costs which have been incurred as a result of specific conduct that has been identified as unreasonable: McPherson -v- BMP Paribas [2004] ICR 1398 CA. In McPherson Mummery stated “the principle of relevance means that the Tribunal must have regard to the nature, gravity and effect of the unreasonable conduct as factors relevant to the exercise and discretion that that is not the same thing as requiring (the receiving party) to provide that specific unreasonable conduct by the (paying party) caused particular cost to be incurred”.

22 Nor is it necessary to dissect conduct under nature, gravity and effect. In Barnsley Metropolitan Borough Council - Yerrakalva Court of Appeal [2011] ICR 420 CA. It was stated **that the vital point in exercising the discretion to order costs is to look at the whole picture** [my emphasis] of what happened in the case and asked whether there has been a reasonable conduct by the claimant in bringing and conducting the case and in doing so to identify the conduct, what was unreasonable about it and what affects it had.

23 Scott v Commissioners of Inland Revenue [2004] IRLR 713 CA, the Court of appeal held “ the relevant question in considering whether the pursuit, or defence, of a claim was misconceived was not whether the party in question thought they were right but whether they had reasonable grounds for so thinking (paragraph 46)”.

24 Rodrigo Patrick Lodwick v London Borough of Southwark [2004] ICR 884 the Court of Appeal referred the fact “costs remain exceptional” and reference was made in the judgment of LG Pill to Sir Hugh Griffiths’ statement in E T Marler Limited v Robertson [1974] ICR 72 the “Ordinary experience of life frequently teaches us that that which is plain for all to see once the dust of battle has subsided was far from clear to the contestants when they took up arms”. “To order costs in the Employment Tribunal is an exceptional course of action and the reason for and basis of an order should be specified clearly...”

25 It remains a fundamental principle that the purpose of an award of costs is to compensate the receiving party, not to punish the paying party (Lodwick above).

Conclusion – applying the law to the facts

26 The Tribunal is aware that it is “rare” for costs orders to be appropriate in Employment Tribunal proceedings; they do not follow the event as in the ordinary course of litigation.

27 With reference to the first issue, namely, did the claimant’s case have reasonable prospects of success, the Tribunal found it had not because the claimant was aware

that the allegation, she raised did not have any basis in reality. This is not a case of the dust of battle settling but of a claimant, for whatever reasons, intentionally bringing proceedings based on untrue allegations whose behaviour has been sharply brought into a focus by an allegation of rape she later retracted stating she had not made an application to amend to introduce the rape allegation because she had not been raped.

28 The Tribunal found the proceedings were misconceived within the meaning of the Rule from the outset of this litigation, and it had no reasonable prospects of success despite the fact that harassment allegations are fact sensitive, this is an exceptional case where the “facts” relied upon by the claimant to substantiate claims that had no basis in reality. The pursuit of the claim was misconceived because the claimant had no reasonable grounds for making the allegations she did: Scott (above).

29 With reference to the second issue, namely, did the claimant act unreasonably in bringing and/or conducting the claim, the Tribunal finds that she did for the reasons already stated.

30 With reference to the third issue, namely, did the claimant act disruptively in conducting the claim, we find that she did. The claimant’s behaviour ranged from ignoring case management orders, seeking adjournments when none was merited, failing to answer questions and prolonging cross-examination, shouting at counsel and abusing her in Farsi, shouting at the judge, generally behaving in an uncooperative manner throughout and raising serious allegations last minute at the final hearing.

31 With reference to the fourth issue, namely, if the answer to any question at paragraphs 1.1, is no and 1.2 or 1.3 above is yes, should the Claimant be required to pay some element of the Respondent’s costs, the Tribunal concluded that it was just and equitable in the very unusual circumstances of this case for the claimant to make a contribution towards the respondent’s costs, and for its discretion to be used in favour of the respondent who has been at the brunt of the claimant’s abusive, disruptive and unreasonable behaviour.

32 With reference to the fifth issue, namely, if so, what element, the Tribunal was in some difficulties as it had to put completely out of its mind punishing the claimant and concentrate on compensating the respondent for the costs it has incurred defending misconceived proceedings and dealing with the claimant’s unreasonable behaviour against a backdrop of what appears to be the claimant impecuniosity and ill-health as she is struggling with a back condition.

33 The claimant submitted she did not have the means to pay costs, having entered into an IVA in 2018. Ms Rezaie referred the Tribunal to the EAT judgment in Vaughan v London Borough of Lewisham and ors [2013] IRLR 713, EAT, which upheld a costs order even though the claimant could not at the time afford to pay it. The Tribunal — referring to the judgment of Lord Justice Rimer in Arrowsmith v Nottingham Trent University [2012] ICR 159, CA accepted that the claimant was not at present in a position to make any substantial payment but took the view that there was a realistic prospect she might be able to do so in due course when her health improved and she was able to resume employment. Dr Izzadoust is highly qualified and intends to enter into the lucrative profession of dentistry according to the evidence before the Tribunal at the

liability hearing, and it is more likely than not there will be a date in the future when she can pay the costs order.

34 Ms Rezaie submitted the claimant should be ordered to pay costs in the sum of £20,000 and a detailed assessment of costs was not being sought. The respondent is substantially out of pocket as a result of the claimant's actions, and the Tribunal was originally minded to order the sum requested, having assessed broad brush, that only a proportion of the additional legal work incurred as a result of the claimant's unreasonable conduct was covered. However, it had in mind the fact that the claimant was in debt, and the possibility that she may remain unemployed for some time in receipt of benefits and various loans and/or gifts of substantial sums of money from other sources, for example, Dr Patel. It found there was a reasonable prospect of Dr Izaddoust being able, in due course, to return to well-paid employment and thus to be in a position to make a payment of costs, but a limit of £6000 should be placed on her liability to take account of her present means and proportionality given her ill health.

35 In conclusion, the Tribunal concluded it was just and equitable for the claimant to pay a contribution towards costs in the sum of £6000 taking into account the fact the claimant is presently off work having had a back operation, she is a doctor and more likely than not in the future, will earn a decent salary. The Tribunal is aware, from the liability hearing, that the claimant wanted to re-qualify as a dentist, her partner Dr Patel had a dental practice and the claimant took time off to look at him carrying out operations for experience. At the liability hearing the claimant described how she came from a family of well-known medical practitioners, and the Tribunal took the view that she might be able to pay costs now or in the future given the way money materialised into her account without an adequate explanation.

Date: 21.4.22
Employment Judge SHOTTER

JUDGMENT AND REASONS SENT TO
THE PARTIES ON 3 May 2022

FOR THE TRIBUNAL OFFICE