



EMPLOYMENT TRIBUNALS

Claimant: Ms S Aguilar Henriquez

Respondent: (1) Pfizer Limited
(2) Deborah Reynolds
(3) Sampath K Srinivasan

Heard at: London South **On: 5 May 2022 (in chambers)**

Before: Employment Judge Khalil (sitting with members)
Ms B Leverton
Mr P Adkins

JUDGMENT ON COSTS UNDER RULE 76

Unanimous Decision:

The claimant is Ordered to pay the first respondent's costs of £1,200 under rule 76 (1) (a), (c) and 76 (2) of the Employment Tribunals Regulations 2013.

Reasons

The application

1. The first respondent (hereinafter 'the respondent') made an application for costs under Rule 76 (1) (a) and (c) and under Rule 76 (2) by a letter dated 21 September 2021.
2. This followed the postponement of the Full Merits Hearing which had listed to be heard commencing 6 September 2021 for 9 days, concluding on 16 September 2021. That Hearing had been listed on 6 July 2020 at a Case Management Hearing on the same day.

Findings of fact relevant to the application

3. The relevant chronology was as follows:
4. The claim form was presented on 29 December 2019 following early conciliation between 31 October and 1 December 2019.

5. A case management Hearing took place on 6 July 2020. Various Orders were made including the provision of further and better particulars against the first respondent and separately against the second and third respondents on or before 11 September 2020.
6. On 24 December 2020 the respondent wrote to the claimant's Solicitors (Slater & Gordon) seeking compliance with the Order.
7. On 4 January 2021, Slater & Gordon sought further time for compliance referring to the claimant's mental health over the previous few months.
8. On 18 February 2021, Slater & Gordon ceased acting for the claimant.
9. On 21 May 2021, the respondent sought compliance from the claimant, now acting in person.
10. On 4 June 2021, the respondent sought an Unless Order from the Tribunal.
11. On 11 August 2021, the respondent applied to strike out the claim.
12. On the first day of the Hearing in September 2021, the respondent and claimant made oral submissions. The Respondent had produced a bundle comprising of the pleadings and the aforementioned correspondence.
13. The claimant had produced a 1-page statement about 11 minutes before the start of the hearing setting out reasons for non-compliance which were:
 - because of her severe mental health issues for which she had been receiving on and off medical treatment and medication and had led to sick leaves and hospitalisation
 - her Tier 2 status and her immigration troubles in relation to which she had needed to dedicate 'significant time'
 - ill health issues in relation to both her parents in relation to which she had needed to travel back to Honduras for 2 months
 - an on-going case in the US against Pfizer Inc costing her time and money
 - communication, post and address changes
14. No supporting evidence was provided but in oral submissions the claimant said she could produce what was required.

15. Following deliberations, the Tribunal ordered the claimant to produce supporting medical evidence to corroborate her statement.
16. The claimant was Ordered to produce:
 - medical evidence in relation to her mental health, sick leave and hospitalisation
 - Tier 2 Visa documentation
 - Evidence of travel to and from Honduras
 - Evidence of her parents' ill health
 - Evidence of litigation in the US
 - Evidence of her change of address
 - A statement of means with supporting documents, anonymised if required
17. The respondent was Ordered to produce:
 - Evidence in support of the claimant being unresponsive and elusive in the past (as claimed/asserted by the respondent)
 - Evidence of sick leave/a fit note (if any) relating to the claimant's absence in 2018
18. The parties provided documents by 4.00pm. The respondent produced various redacted ACAS correspondence to counter the claimant's assertion that the respondent had not engaged with ACAS. Also, the respondent produced some documents relating to the claimant's sickness absence and the claimant's absence without leave.
19. The claimant produced a series of documents which, in summary set out as follows:
 - The claimant's travel to Honduras on 11 December 2020 and return to the UK on 31 January 2021
 - The claimant's parents' ill health evidenced by a positive Covid-19 test for her father around 18-22 November 2020 and her mother's ill health between 6-10 December 2020
 - The claimant's fit notes on 4 October 2018 and 2 November 2018 for anxiety and depression; a referral for psychiatric support on 25 February 2020; gastro- intestinal referral on 1 September 2021 (in evidence she

said her symptoms were connected to/caused by stress); hospitalisation in Honduras on 23 December 2020.

- A receipt in respect of the claimant's ILR application on 15 August 2021
 - Extension of the claimant's redundancy from GSK to 1 October 2021
20. The Tribunal took evidence of the claimant's current means which was approximately £4,000 (net) per month. The claimant said her fixed outgoings were broadly the same (rent, utilities, food). She has no children but occasionally supports her parents. She is in debt by about £5,000. The claimant's testimony was accepted.
21. In oral testimony the claimant said she had not complied with the case management orders or prosecuted her case because she couldn't handle her claim. She said she had been too unwell such that she could not get out of bed, do her cooking and found dealing with the case on her own overwhelming. She said she had stopped her anti-depressant medication by about April 2021. She had had about 4 virtual sessions for therapy/counselling since February 2021. Although not corroborated by medical evidence, the claimant's oral testimony was accepted.

Conclusions on the respondent's strike out application (announced on 7 September 2021)

22. The Tribunal carefully considered the competing arguments on the application to strike out the claim. The Tribunal acknowledged the draconian step to strike out a claim particularly a discrimination claim.
23. The Tribunal noted there had been both non-compliance with Tribunal Orders and no prosecution of the claim by the claimant since the CMOs made in July 2020.
24. Since that time, the claimant had been able to explain and corroborate periods of inactivity by reason of her parents' ill health and her need to travel to Honduras for a period of just less than 2 months. The claimant had also secured another role and had also spent time securing her ILR in the UK from a status of being on a Tier 2 visa. The claimant did have Solicitors acting for her who ceased acting for her in February 2021.
25. She had privately funded her litigation in the UK and what appeared to be pre-action litigation in the US. She had paid for her hospitalisation in Honduras and the claimant had spent significant private funds and time securing her immigration status. The application itself cost just under £3,000. The Tribunal concluded that this was a key focus for the claimant.
26. The claimant's excuse for non-compliance and inactivity was essentially that she could not cope with the litigation. Her state of health and

emotional fragility manifested itself at the Hearing which the Tribunal concluded was bona fide.

27. The Tribunal concluded that striking out the claim was a step too far and disproportionate and would not be just or fair. This was a unanimous decision. The respondent was not to be criticised in this respect, it had acted professionally in its attempts to encourage compliance and action from the claimant with forbearance.
28. On the question of prejudice and the ability to have a fair trial with cogent evidence, the Tribunal concluded this remained possible. The trial was now not likely to take place until 2023 due to listing availability. The Tribunal concluded that the delay could be mitigated by compliance with Orders which were re-set commencing from December 2021 through to July 2022. The Tribunal noted the claim form, whilst quite rightly requiring clarity and particularisation, was heavily pleaded and a lot of the broad/headline assertions with approximate date periods and the persons allegedly involved, were already known to the respondent. Further, the respondent's legal/jurisdictional defence in relation to the second and third respondents was unlikely to change.
29. To mitigate against further prejudice to the respondent, the requirement for the claimant to fully comply with the Orders to provide further particulars (paragraphs 1 and 2 of the Tribunal's Orders made on 6 July 2020) were made as Unless orders. If the claimant did not comply, her claims would stand dismissed without further Order.
30. In relation to costs occasioned by the postponement of the full Hearing and/or in connection with the claimant's conduct which formed the basis of the respondent's application, Rule 76 (1) says a Tribunal may consider making a Costs Order and shall consider whether to do so where a party has acted vexatiously, abusively, disruptively or otherwise unreasonably in the way the proceedings have been conducted or, where a Hearing has been postponed on the application of a party made less than 7 days before the Hearing was to begin. Alternatively, under Rule 76 (2), a Tribunal may make a Costs Order where a party has been in breach of any Order or where a Hearing has been postponed on the application of a party. The parties were directed to provide submissions on costs on or before 21 September 2021 which the Tribunal would consider on the papers in Chambers as soon as possible thereafter.

Applicable Law

31. Rule 76 (1) (a) says:

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

Rule 76(1) (c) says:

A Hearing has been postponed or adjourned on the application of a party made less than 7 days before the date on which the relevant hearing begins

Rule 76 (2) says:

A Tribunal may also make such an Order where a party has been in breach of any Order or practice direction or where a hearing has been postponed or adjourned on the application of a party.

32. In assessing whether a party has acted unreasonably, the Court of Appeal in ***Yerrakalva v Barnsley Metropolitan Borough Council and another 2012 ICR 420*** held that the vital point in exercising the discretion 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 the case and in doing so, identify the conduct, what was unreasonable about it and what effect it had. Where a Tribunal finds unreasonable conduct and exercises its discretion to make a costs order, there is no requirement to establish a causal link between the unreasonable conduct and costs attributable to that unreasonable conduct (***Yerrakalva***).

Conclusions on Costs

33. No substantive response was received from the claimant in relation to the respondent's costs application. The time to do so was extended to 27 October 2021 by the Tribunal's letter of 20 October 2021.
34. The claimant was on the same date ordered to produce a statement of means by 27 October 2021. That was not forthcoming either.
35. The Tribunal concluded that the respondent's application under Rule 76 (1) (a) was well founded. The claimant's conduct had been unreasonable. The Tribunal noted the claimant had been well enough to work (for GSK) and there was no evidence of sick leave before the Tribunal. The claimant could and should have written to the Tribunal and the respondent from the making of the Case Management Orders on 6 July 2020 and well before 6 September 2021 requesting a stay on the proceedings, varying the time for compliance in respect of the Orders or applying for the Final hearing to be postponed. To do nothing in that period which included a substantive period when she was legally represented was unreasonable notwithstanding evidence of her mitigating personal circumstances. For the same reasons, the application under Rule 76 (1) (c) also succeeds. The claimant's request for a postponement was made 11 minutes before the start of the final Hearing on 6 September 2021.
36. The Tribunal concluded that the first respondent's application under Rule 76 (2) was also well founded. The claimant had been Ordered to provide

further and better particulars of her claim against all respondents and a schedule of loss. This had not happened despite the respondent's chasers. As a result, the respondent had not been able to prepare an amended response and there was a direct consequential impact on non-compliance with disclosure (and a Bundle) and the exchange of witness statements.

37. In relation to the Tribunal's discretion to award costs, the Tribunal noted that the claims are pursued against named individuals too. The respondent was entitled to know the basis and extent to which it was being asserted that it was liable/responsible for the alleged actions of the second and third respondents. The Tribunal considered the sums sought by the first respondent were reasonable and proportionate – the claim was limited to counsel's fees for attendance on the first day and morning of the second day. No brief fee for a 9-day hearing was sought, no Solicitor's fees were sought. The claimant had not provided a statement of means as ordered but did have net income of about £4,000 per month. Whilst her outgoings on rent, utilities and food were of a similar level, the Tribunal did not consider this to be compelling enough not to make an award for the sum sought. The claimant had been privately funding litigation in the US which the claimant was able to do. The claimant had also, up until February 2021, been legally represented. She ought to have been aware of the risks of ill-preparation and could have instructed her advisers to make applications (see above) on her behalf. In relation to the amount of a Costs award, for the same reasons, the Tribunal concluded that the claimant should pay the sum of £1200.

38. The Tribunal reminds the parties and in the light of this Judgment, the claimant in particular, of the importance of being fully ready for trial at the final Hearing.

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Employment Judge Khalil

5 May 2022