EMPLOYMENT TRIBUNALS

Claimant		Respondent
Ms J Chambers	v	**Kent Community Health NHS Foundation Trust**

JUDGMENT ON COSTS UNDER RULE 76

The claimant is ordered to pay the respondent's costs of £10,000 under rule 76 (1) (a) of the Employment Tribunals Regulations 2013.

REASONS

Preliminary

1. The respondent applied for costs incurred in defence of the claim made by the claimant following the Employment Tribunal's Judgment dated 4 May 2022.

2. The respondent had applied for the claimant's claim to be struck out by reason of her conducting proceedings in an unreasonable and/or vexatious manner by application dated 11 May 2021. At a Preliminary Hearing on 15 March 2022, the Tribunal determined that the manner in which the claimant had conducted her case was vexatious and unreasonable such that *"a fair trial is no longer possible"* and struck out the claim.

3. The long narrative of findings in that judgment is relied upon but is not repeated. In summary, the claimant alleged that the respondent was involved in hacking her Outlook email account. The claimant made serious allegations of fraud and criminal behaviour against the respondent, its witnesses and the respondent's solicitors. She reported the respondent's solicitors to the Solicitors Regulation Authority on the Red Fraud Alert hotline and also referred her allegations to the Police. All of the emails which the claimant alleged had been obtained fraudulently had been sent to the respondent by the claimant's representative except for one email which had been sent by the claimant herself. The Police ended its investigation. The claimant continued to repeat the same allegations. In particular, the Tribunal noted its findings in paragraphs 68, 74, 75 and 78. The claimant continued to raise the allegations up to and after the Preliminary Hearing on 15 March 2022.

Law Costs

4. The power to award costs is contained in the Tribunal Rules, which sets out the definition of costs at rule 74(1). Rule 75(1) provides that a costs order includes an order that a party makes a payment to another party "in respect of the costs that the receiving party has incurred while legally represented". The circumstances in which a costs order may be made are set out in rule 76 and relevant to this application 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; or (b) any claim or response had no reasonable prospect of success." The procedure by which the costs application should be considered is set out in rule 77 and the amount which the Tribunal may award is governed by rule 78. In summary, rule 78 empowers a Tribunal to make an order in respect of a specified amount not exceeding £20,000, or alternatively to order the paying party to pay the whole or specified part of the costs with the amount to be determined following a detailed assessment. 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."

5. In **Gee v. Shell UK Limited** [2003] IRLR 82 CA, the Court of Appeal confirmed that it is a fundamental principle that costs are the exception rather than the rule and that costs do not follow the event in Employment Tribunals. This was confirmed in paragraph 8 of **Vaughan v. London Borough of Lewisham** [2013] IRLR 713 EAT. At paragraph 25, Underhill J. (as he then was) observed that:

> "the basis on which the costs threshold was crossed was not any conduct which could readily be attributed to the appellant's lack of experience as a litigant' [but was] 'her fundamentally unreasonable appreciation of the behaviour of her employers and colleagues".

6. When making a costs order on the ground of unreasonable conduct, the discretion of the tribunal is not fettered by any requirement to link the award causally to particular costs which have been incurred as a result of specific conduct that has been identified as unreasonable (**McPherson v. BNP Paribas (London Branch)** [2004] ICR 1398, Mummery LJ (at para 40):

> '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 of the discretion, but that is not the same as requiring [the receiving party] to prove that specific unreasonable conduct by [the paying party] caused particular costs to be incurred".

7. In **Barnsley Metropolitan Borough Council v. Yerrakalva** [2012] IRLR 78 CA, at para 41:

> 'The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable 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 effects if had".

8. In relation to a costs warning Harvey said at para 1087.01:

> "This is a particularly important step to take in the case of an unrepresented claimant, as the failure to do so might result in no costs being awarded where otherwise they would have been"

9. In **Rogers v. Dorothy Barley School** UKEAT/0013/12 (14 March 2012, unreported), the EAT refused to award costs against the appellant, who was unrepresented and who refused to accept that his claim was wholly misconceived. Mr Recorder Luba QC said:

> "There is a number of features of this application for costs that lead me to the conclusion that it would not be right to order Mr Rogers to pay costs. The first is that the Respondent employer has known for many months that Mr Rogers is acting in person and is simply not grasping the jurisdictional question that his appeal raises, yet there is no letter or other correspondence or intimation to him warning him that if he proceeds, an application for costs will be made. Secondly, no recent notice of the application for costs has been given at all, even though it must have been apparent within the last days and weeks that the appeal would be pressed to a full hearing and that costs might be sought; as I say, no intimation whatever was given. Thirdly, the applicant for costs, the Respondent, has not given any notice to Mr Rogers of the extent of the costs it would seek, so he has had no opportunity to assess or contest the amount that is proposed. Finally, I take into account the underlying difficulty that has given rise to these proceedings in the first place."

However, in paragraphs 18 and 19 of **Vaughan**, it was said:

> "If there is any criticism, it could only be that they did not write to her at an early stage setting out the weaknesses in her claims and warning that a costs order would be sought if they failed."

10. If a well-argued warning letter is sent, a failure by the claimant to engage properly with the points raised in it can amount to unreasonable conduct if the case proceeds to a hearing and the respondents are successful for substantially the reasons that were contained in the letter. In **Peat v. Birmingham City Council** UKEAT/0503/11 (10 April 2012, unreported) at para 28:

> "We think that if they had engaged with that issue the Appellants, even if they considered they had a reasonable prospect of success, would have been likely to have appreciated that it was so thin, that it was not worth going on with the hearing".

11. **AQ Ltd v. Holden** [2012] IRLR 648 EAT confirmed, at paragraph 32, that the status of the litigant is a matter that the tribunal must take into account:

> ''A tribunal cannot and should not judge a litigant in person by the standards of a professional representative. Lay people are entitled to represent themselves in tribunals; and, since legal aid is not available and they will not usually recover costs if they are successful, it is inevitable that many lay people will represent themselves. Justice requires that tribunals do not apply professional standards to lay people, who may be involved in legal proceedings for the only time in their life. As [counsel for the claimant] submitted, lay people are likely to lack the objectivity and knowledge of law and practice brought by a professional adviser. Tribunals must bear this in mind when assessing the threshold tests in [rule 76(1)(a)]. Further, even if the threshold tests for an order of costs are met, the

> tribunal has discretion whether to make an order. This discretion will be exercised having regard to all the circumstances. It is not irrelevant that a lay person may have brought proceedings with little or no access to specialist help and advice."

However, it is not the case “that lay people are immune from orders for costs: far from it, as the cases make clear. Some litigants in person are found to have behaved vexatiously or unreasonably even when proper allowance is made for their inexperience and lack of objectivity” (para 33).

12. Rule 84 provides a discretion whereby tribunals may have regard to the paying party's ability to pay. The fact that a party's ability to pay is limited does not, however, require the tribunal to assess a sum that is confined to an amount that he or she could pay according to **Arrowsmith v. Nottingham Trent University** [2012] ICR 159, at para 37. In **Arrowsmith**, the Court of Appeal, in upholding a costs order of £3,000 made by an employment tribunal against a claimant of very limited means, commented that:

> “[h]er circumstances may well improve and no doubt she hopes that they will” (per Rimer LJ).

13. In **Oni v. UNISON** UKEAT/0370/14/LA, the Employment Appeal Tribunal confirmed that rule 76 imposes a two-stage test on the Tribunal. The first stage being whether the circumstances of Rule 76 are engaged and if so secondly, the Tribunal must determine whether to make the award of costs.

14. Further guidance is provided in **Keskar v. Governors of All Saints Church England School and Another** [1991] ICR 493 EAT. The Employment Appeal Tribunal held:

> “The question whether a person against whom an order for costs is proposed to be made ought to have known that the claims he was making had no substance, is plainly something which is, at the lowest capable of being relevant, and we are quite satisfied from the decision itself, in the paragraph which I have read and need not repeat, that the industrial tribunal did have before it the relevant material, namely that there was virtually nothing to support the allegations that the applicant made, from which they drew the conclusion that he had acted unreasonably in bringing the complaint. That in our view, does involve an assessment of the reasonableness of bringing the proceedings, in the light of the non-existence of any significant material in support of them, and to that extent there is necessarily involved a consideration of the question whether the applicant ought to have known that there was virtually nothing to support his allegations.”

18. In determining whether to make a cost order, the Tribunal must go through a three-stage procedure (see paragraph 25 of **Haydar v Pennine Acute NHS Trust** UKEAT 0141/17/BA). The first stage is to decide whether the power to award costs has arisen, whether by way of unreasonable conduct or otherwise under rule 76; if so, the second stage is to decide whether to make an award, and, if so, the third stage is to decide how much to award.

DISCUSSION and DECISION

Does the claimant's conduct fall within Rule 76(1)(a)?

19. The claimant has produced an enormous amount of documentation in an effort to establish her hacking claim and directed her arguments to that end. She has subjected the respondent and its representatives to quite unreasonable complaints and persisted in those complaints. The claimant was aware that she was using employment tribunal proceedings to establish behaviour over which the Tribunal had no jurisdiction even if she had been successful. The Tribunal concluded that the respondent's application under Rule 76 (1) (a) was well founded. The claimant's conduct has been unreasonable. This conduct meant that the respondent incurred very substantial legal costs.

Is it appropriate to exercise the discretion to award costs?

20. No substantive response was received from the claimant in relation to the respondent's costs application despite her capacity for entering into lengthy correspondence about her claim. Standing the findings about her conduct, the tribunal considered it appropriate to make a costs order.

In what amount?

21. Although the Tribunal noted that a costs warning was not sent, the solicitors for the respondent have, with commendable patience and restraint, explained to the claimant the difficulties caused by her conduct. She has carried on regardless. It must have been apparent to the claimant that the difficulties she was causing the respondent would have implications for their legal costs.

22. The claimant has not provided evidence of her means despite being invited to do so in the costs application. There was nothing in the vast amount of material available to the tribunal which gave a sufficient indication of the claimant's financial circumstances. There was no schedule of loss. The tribunal decided not to order the provision of such information as it would continue the correspondence. The tribunal proceeded on the basis that she did not have substantial means.

15. The respondent has sought a costs order for £92,000 and produced a schedule of costs. This does not contain detail but has been taken to cover the entire period from October 2018 to May 2022 which would cover the respondent's work in meeting the complaint to the police and SRA. The tribunal accepts that these costs were incurred.

16. The initial claim to the tribunal was within its jurisdiction. Thereafter, the clamant pursued the course of action set out in the Preliminary Hearing judgment. Whilst the tribunal does not wish to suggest that any costs incurred by the respondent were inappropriate, it did not consider that a detailed assessment of the costs should be sought with a view to making a very substantial costs award. Taking the broadest of brushes, and by no means seeking to excuse the conduct of the claimant, the tribunal considered it appropriate to awards costs of £10,000.

Employment Judge Truscott QC

Date 14 July 2022