EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mr F Ogunnote	v	**Abellio London Limited**

Before: **Employment Judge Truscott QC**
Ms A Williams
Ms C Upshall

JUDGMENT ON COSTS UNDER RULE 76

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

REASONS

Preliminary

1. The tribunal struck out the claim because it was not being actively pursued

2. The respondent made an application pursuant to Rule 76 for its costs in respect of the Judgment dated 11 April 2021. The respondent seeks an award in the sum of £2000 (exclusive of VAT) in terms of a schedule of costs. In addition to seeking costs for failing to pursue the claim, the respondent seeks costs on the grounds that the claimant's claim had no reasonable prospect of success over and above an award of nil or a nominal award of £2 and further that the claimant and the claimant's representative acted vexatiously, abusively and unreasonably in the conduct of the proceedings and or that costs have been incurred as a result of an improper/unreasonable act or omission on the part of the representative. Further the respondent seeks an award of wasted costs against the claimant's representative as the respondent has incurred costs as a result of an improper and or unreasonable act or omission on the part of the representative.

Findings of fact relevant to the application

3. The claimant filed a claim at the Employment Tribunal on 8 April 2020 which included claims for breach of sections 3, 9, 10, 11 and 13 of the Employment Relations Act 1999 and breach of sections 13, 19, 26 and 27 of the Equality Act 2010. The case was listed for a preliminary hearing to take place on 11 February 2021.

4. Mr John Neckles, of the trade union PTSC, appeared on behalf of the claimant at the Preliminary Hearing on 11 February and withdrew all claims apart from those under sections 10 and 11 of the ERA 1999. Employment Judge Hargrove made an Order for the parties to file written submissions by 13 March 2021 and the parties were to confirm to the Tribunal if they required a Hearing or whether the matter could be dealt with by way of written submissions. The respondent filed written submissions together with a bundle and sought a hearing. The claimant's representative did not file his submissions or correspond with the respondent. On 12 August, the respondent applied to the Tribunal for the claim to be struck out and an Unless Order was made on 12 November. Mr John Neckles filed documentation on 19 November. The respondent attempted to contact Mr Neckles by email to clarify the documentation, but he did not respond.

5. The last communication from the claimant's representative was on 11 February 2022 when Mr Neckles contacted the Tribunal and the respondent's representative in the mistaken belief a Hearing was taking place on that day. It transpired that he had been confused with the Hearing that had taken place on 11 February 2021.

6. The parties received a Notice of Hearing on 25 March listing the Hearing for 11 April 2022. The claimant and/or his representative failed to attend the hearing on 11 April without any explanation and in their absence an application was made by the respondent to strike out the claim. The application was granted and Judgment was issued which struck out the claim on the basis it was not being actively pursued.

7. The claimant made a late application for a reconsideration which was refused.

Law Costs

8. 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."

9. 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".

10. 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".

11. 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".

12. 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"

13. 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."

14. 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".

15. **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).

16. 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).

17. 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.

18. 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.

Wasted costs orders

19. The Employment Appeal Tribunal has confirmed in **Mitchell Solicitors v Funkiness Information Technologies York Ltd** EAT 0541/07 that since Rule 80 is based on the wasted costs regime in the civil courts, the authorities on that regime are equally applicable to the Employment Tribunal.

20. In the leading case of **Ridehalgh v Horsefield** [1994] 3 All ER 848, the Court of Appeal set out a three- stage test in respect of wasted costs applications:

> a. first, has the legal representative acted improperly, unreasonably, or negligently?
> b. secondly, if so, did such conduct cause the applicant to incur unnecessary costs?
> c. thirdly, if so, is it in the circumstances just to order the legal representative to compensate the applicant for the whole or any part of the relevant costs?

It held that "improper" covers, but is not confined to, conduct that would ordinarily be held to justify disbarment, striking off, suspension from practice or other serious professional penalty. "Unreasonable" describes conduct that is vexatious, designed to harass the other side rather than advance the resolution of the case and "negligent" should be understood in a non-technical way to denote failure to act with the competence reasonably to be expected of ordinary members of the profession. It was

emphasised that a legal representative should not be held to have acted improperly, unreasonably or negligently simply because he or she acts on behalf of a party whose claim or defence is doomed to fail. See also **Cliffhanger Duce and Hammer v Inns (t/a PARC Fermi) and another** EAT 0100/08. Failings in the litigation should not readily be blamed on a representative, especially if their client has not waived privilege.

21. There is no limit to the amount of wasted costs that can be ordered by the Employment Tribunal and there is no power to refer such costs for detailed assessment.

22. Rule 84, which permits the Tribunal to consider the paying party's ability to pay, applies equally to wasted costs orders.

DISCUSSION and DECISION

23. The respondent has incurred legal costs to defend the claim.

24. The tribunal has been informed that there are various Judgments whereby the claimants have been awarded the nominal sum of £2, including those of Gnahoua, Batchelor and the most recent case of Jimale, all of which the claimant's representative was involved in. Whilst not binding on other tribunals, these judgments indicate that any compensation awarded for a breach of the right to be accompanied is compensatory, not punitive, for any detriment or loss suffered as a result of said breach.

25. The facts of this case were said to be similar to those of the cases narrated in paragraph 25 which ought to have been known to the claimant's representative. The claimant in these proceedings appears to have suffered no loss or detriment and did select another representative and the respondent took no further action in the disciplinary process.

26. Standing the contents of the respondent's written submissions, the tribunal does not know why the suggestion that the case could be dealt with on paper not accepted by the respondent but a hearing was requested.

27. In these circumstances, the tribunal was not prepared to make findings about whether it was unreasonable to have brought the claim at all or that it was unreasonable for the claiamnt or his representative to conduct the proceedings in the manner in which it was conducted.

28. The tribunal is not prepared to make a wasted costs order as it has no information about the claimant's representative other than the failures set out above.

29. The tribunal was not aware whether a costs warning has been sent to the claimant.

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

30. The tribunal concluded that the failure of the claimant or his representative to pursue the claim was unreasonable. The tribunal concluded that the respondent's application under Rule 76 (1) (a) was well founded, to this extent.

Is it appropriate to exercise the discretion to award costs?

20. No explanation has ever been forthcoming for the failure to actively pursue this claim and appear at the hearing. No substantive response was received from the claimant in relation to the respondent's costs application. 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 claimant's representative must have been aware of the legal cost implications of the claim for the respondent. Nonetheless, the claim was made and pursued up to a point.

22. The claimant has not provided evidence of his means. There was no schedule of loss. The tribunal decided not to order the provision of such information.

31. The respondent has sought a costs order for £2,000 and produced a schedule of costs. The tribunal accepts that these costs were incurred from the initiation of the claim.

32. The initial claim to the tribunal was within its jurisdiction. It seems likely that the claimant would have succeeded and possibly been awarded a token sum. It was the respondent who sought a hearing and was granted one. The tribunal did not consider it appropriate to award the whole costs of the defence of the claim against the claimant. The tribunal considered it appropriate to awards costs of £1,000.

Employment Judge Truscott QC
Date 15 July 2022