EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms C Thomas	v	King's College Hospital NHS Foundation Trust

JUDGMENT

The Respondent's application that the Claimant pay its costs under rule 76 (1) (a) and (b) of the Employment Tribunals Regulations 2013 is refused.

REASONS

Preliminary

1. The bases for the application are that the Claimant acted unreasonably in the way in which she conducted and/or brought the proceedings (rule 76(1)(a)) and her claims had no reasonable prospect of success (rule 76(1)(b)). The Respondent has incurred costs in defending these proceedings, of more than £9,600.

2. Whilst it is recognised that the Tribunal is typically a no costs jurisdiction, the Respondent considers that the Claimant's unreasonable conduct and pursuit of inherently unmeritorious claims falls firmly within the scope of Rule 76 and should be marked with an Order for costs. The Respondent asserts that the Claimant knew, or ought reasonably to have known, that her claims had no reasonable prospect of success.

3. On 2 June 2021, the Tribunal asked the Claimant to provide a witness statement and medical records in relation to her alleged disability. The Respondent provided a detailed Grounds of Resistance and Application to Strike out on 10 June 2021 explaining that the Claimant had set out no basis for either a disability discrimination claim or a wages claim and that both should be struck out due to having no reasonable prospect of success. The Claimant provided a witness statement on 29 June 2021 and the Respondent replied on 13 July 2021 maintaining the position set out in the application to strike out. The Claimant provided an updated witness

statement and medical expert report on 13 July 2021 and the Respondent replied on 15 March 2022 maintaining its earlier position.

4. In her ET1 the Claimant ticked the box to confirm she is not disabled and she herself reaffirmed that she was not disabled in her first witness statement sent on 29 June 2021. In her second witness statement sent on 13 July 2021 the Claimant again maintained that she is not disabled but also included a contradicting section at the end of her statement outlining that she is disabled under the Equality Act 2010. The Respondent has consistently maintained that the Claimant could not bring a disability discrimination claim as she herself states she is not disabled and the Respondent explained that the Claimant had failed to identify the disability relied upon and how it meets the definition of section 6 of the Equality Act 2010.

5. In the judgment, the Tribunal agreed that the Claimant had *'not set out any basis for asserting she is disabled within the meaning of section 6 of the Equality Act 2010, or particularised any specific allegations of disability discrimination against the Respondent…The Claimant has not provided grounds for alleging that she was discriminated against on the grounds of any alleged disability, nor has she stated which head of disability discrimination is alleged'.* [Para 36]

6. The Respondent had previously explained that the Claimant appeared to be bringing a claim for personal injury which the Tribunal had no jurisdiction to hear. At paragraph 37 of the judgment the Tribunal agreed with this and confirmed that the Claimant *'has raised proceedings in the civil courts for personal injury on 3 May 2018'.* [Para 37]

7. The Tribunal also said in its judgment that *'the Claimant has not set out any grounds for asserting that she is owed wages…the Claimant was denied injury allowance because she did not meet the criteria for payment. Injury allowance does not constitute "wages" within the meaning of section 27 ERA 1996, or that any injury allowance was properly payable to the Claimant in any event'.* [Para 38]

8. The Respondent had also previously explained that the Claimant appeared to be bringing a claim for breach of contract which the Tribunal had no jurisdiction to hear. At paragraph 39 of the judgment the Tribunal agreed with this and confirmed that *'Since the Claimant remains employed by the Respondent, the Tribunal does not have jurisdiction to hear any claim for breach of contract…as the claim is not arising or outstanding on termination of the Claimant's employment, the Claimant's employment having not ended. This is a matter for the civil courts'.* [Para 39]

9. At paragraph 42 of the judgment, the Tribunal confirmed that they had considered whether the Claimant's claims might be cured by extension of time and amendment of pleadings but concluded that the claims were incurably deficient.

Law Costs

10. 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.”

11. 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”.

12. 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”.

13. 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”.

14. 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”

15. 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."

16. 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".

17. **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).

18. 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).

19. 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.

20. 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."

21. 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) and (b)?

22. In the light of the findings by the Tribunal set out earlier, the Tribunal concluded that the conduct did fall within Rules 76(1)(a) and (b).

Is it appropriate to exercise the discretion to award costs?

23. Although the claim had no prospects of success and notwithstanding the Claimant was told this, she continued with it up to the hearing, she seemed genuinely perplexed by the legal complexities involved. The Tribunal considers that she would have had no understanding of the costs implications of what she was doing. The Tribunal considers that the Claimant ought to have received a costs warning to make her appreciate the implications of what she was doing. It was not enough to state the legal position to her on three occasions. In these circumstances, the application is refused.

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Employment Judge Truscott QC
Date: 5 August 2022

Sent to the parties on
Date: 8 August 2022