



EMPLOYMENT TRIBUNALS

Claimant: Miss T Vosper
Respondent: DPD Group UK Limited
Heard at: Cambridge Employment Tribunal
On: 20 September 2022
Before: Employment Judge Hutchings

Representation

Claimant: did not attend

Respondent: Mr Bownes, Freeths LLP

JUDGMENT ON COSTS

The Claimant is ordered to pay the Respondent £6,783.70 inclusive of VAT in respect of the Respondent's costs.

REASONS

Introduction

1. The Claimant was employed by the Respondent, a parcel delivery service, as a counter manager from 29 November 2017 until she was dismissed on 11 January 2021. ACAS conciliation took place between 17 March 2021 and 17 April 2021. Miss Vosper issued a claim for unfair dismissal on 21 May 2021. A hearing took place before Judge Warren on 28 March 2022. The hearing was listed to hear an application by the Respondent to strike out Miss Vosper's claim; if this did not succeed all parties were on notice that the hearing would proceed as a full merits hearing.
2. By Judgment dated 10 April 2022 Miss Vosper's claim was struck out on the grounds that *'the Claimant's conduct of these proceedings has been vexatious and unreasonable'* and for her failure to comply with an order of the Tribunal. The Judgment records that Miss Vosper's claim *'is not being actively pursued'*.
3. In reasons for this Judgment dated 28 March 2022 Judge Warren made findings of fact as to Miss Vosper's actions and explanations on which he based

his conclusion that her conduct of the claim was vexatious and unreasonable. Reasons for this Judgment were issued on 5 April 2022 (the 'Reasons').

Costs application

4. On 6 May 2022 the Respondent made an application to recover its costs of the proceedings pursuant to Rule 76(1)(a) of the Employment Tribunal Rules of Procedure 2013 (the 'Rules') relying on the conclusion of Judge Warren that Miss Vosper's conduct of her claim was unreasonable and vexatious and that she had breached multiple orders of the Tribunal (Rule 76(2)). The application relies on the findings of fact of Judge Warren as set out in the Reasons, specifically:
 - 4.1. *That the Claimant had repeatedly failed to engage with us in respect of case management directions (paragraphs 4 — 7).*
 - 4.2. *That when corresponding with the Claimant we used her correct email address (paragraph 5).*
 - 4.3. *That the Claimant failed to respond to repeated strike out applications and warnings (paragraphs 7-10).*
 - 4.4. *That the Respondent had fully prepared its case for hearing, with witness statements and a properly constituted bundle (paragraphs 14, 21).*
 - 4.5. *That the Claimant failed to respond to questions posed by Employment Judge Tynan and Employment Judge Ord (paragraph 15).*
 - 4.6. *That the matter remained in the Tribunal's list on 28 March 2022 as a final hearing although the Regional Employment Judge had directed that the Respondent's strike out application should be addressed at the outset of the hearing (paragraph 17).*
 - 4.7. *That the Claimant failed to attend the hearing on 28 March 2022 until chased by the Tribunal (paragraph 18).*
 - 4.8. *That the Claimant was not honest with Employment Judge Warren and that her explanations were not credible (paragraphs 29, 30, 32, 34, 37).*
 - 4.9. *That the Claimant was guilty of unreasonable conduct (paragraphs 31, 32).*
 - 4.10. *That during the hearing on 28 March 2022 the Claimant made a completely unfounded allegation that we, as the Respondent's solicitors, would provide to the Tribunal, or refer the Tribunal to, correspondence that we had not actually sent in order to paint the Claimant in a bad light (paragraph 33).*
 - 4.11. *That the Claimant had deliberately not corresponded with the writer and that such behaviour was contrary to the overriding objective and constituted further unreasonable conduct by her (paragraph 36).*
 - 4.12. *That the Claimant's conduct in relation to failure to attend the hearing was also unreasonable conduct (paragraph 38).*

- 4.13. *That the Claimant's conduct of the proceedings as a whole has been unreasonable and vexatious, that she had attempted to frustrate the Respondent, that she had deliberately not complied with Case Management Orders, that she had ignored correspondence from Employment Judges, that she had not actively pursued her case in any way whatsoever, that she had deliberately and persistently disregarded the Tribunal's procedural steps and that she had chosen not to cooperate with either us or the Tribunal (paragraph 40).*
- 4.14. *That the Claimant has had the opportunity to present her case but instead abused the system (paragraph 42).*
5. Judge Warren commented that Miss Vosper had wasted Employment Tribunal resources, concluding:
- 'Miss Vosper's conduct of these proceedings has been unreasonable, it has been vexatious; she has been attempting to frustrate the Respondents, she has deliberately not complied with Case Management Orders, she has not complied with the Regional Employment Judge's strike out warning, she ignored EJ Ord's correspondence, she has not been actively pursuing the case in any way whatsoever and in my view, she has deliberately and persistently disregarded the Tribunal's procedural steps.'*
6. Details of the Respondent's claim for costs are set out in a schedule submitted to the Tribunal (and sent to the Claimant) before the hearing; the full schedule details fee-earner rates and units of work undertaken. In summary, the Respondent claims £14,492.40 as follows:
- 6.1. Correspondence £3,660.40;
6.2. Telephone calls £405.30;
6.3. Attendance Conference with witnesses £595.00;
6.4. Preparation for hearing £6,311.70
6.5. Attendance at hearing £1,000.00;
6.6. Travel to costs hearing; £1,540.00; and
6.7. Attendance at costs hearing £980.00.

Procedure and evidence

7. The Respondent provided a 52-page hearing bundle to support its application for costs.
8. On 5 July 2022 Judge Warren directed the Claimant as follows:

'By the date no later than 28 days after the posting of this letter to the parties, the claimant is to prepare and serve a witness statement setting out details of her income, outgoings, capital assets including savings, debts and liabilities. The statement is to be accompanied by supporting copy documentation as evidence of her means. Such documents may be redacted to preserve security, but the original documents must be available for inspection by the Employment Judge hearing the costs application. If the claimant fails to comply with this order in any way, including the supply of insufficient evidence as to her means, the Employment Judge hearing the application may draw adverse inferences, including that the claimant has sufficient means to meet the liability of any costs order.'

Relevant law

9. The Employment Tribunal Procedure Rules provide as follows in relation to the 9.1. procedure for making a costs application:

“77. A party may apply for a costs order or a preparation time order at any stage up to 28 days after the date on which the judgment finally determining the proceedings in respect of that party was sent to the parties. No such order may be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application.”

10. The Employment Tribunal Procedure Rules provide as follows in relation to the time when a deadline is to be complied with:

“4.—(1) Unless otherwise specified by the Tribunal, an act required by these Rules, a practice direction or an order of a Tribunal to be done on or by a particular day may be done at any time before midnight on that day. If there is an issue as to whether the act has been done by that time, the party claiming to have done it shall prove compliance.”

11. The Tribunal has the power to order the payment of costs and witness expenses. The Employment Tribunal Procedure Rules rule 75 sets out the nature of these orders:

*“75.—(1) A costs order is an order that a party (“the paying party”) make a payment to—
another party (“the receiving party”) in respect of the costs that the receiving party has incurred while legally represented or while represented by a lay representative; [...] or
another party or a witness in respect of expenses incurred, or to be incurred, for the purpose of, or in connection with, an individual’s attendance as a witness at the Tribunal.”*

12. The Employment Tribunal Procedure Rules rule 76 sets out when a costs order or a preparation time order may be made:

*“76.—(1) 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; [...]*

(5) A Tribunal may make a costs order of the kind described in rule 75(1)(c) on the application of a party or the witness in question, or on its own initiative, where a witness has attended or has been ordered to attend to give oral evidence at a hearing.”

13. The test for imposition of a costs order under rule 76(1) is a two-stage test: first, a tribunal must ask itself whether a party’s conduct falls within rule 76(1); if so,

it must go on to ask itself whether it is appropriate to exercise its discretion in favour of awarding costs against that party.

14. The decision to make a costs order is the exception rather than the rule. This was made clear in Yerrakalva v Barnsley Metropolitan Borough Council [2011] EWCA Civ 1255; [2012] ICR 420 (3 November 2011) by Mummery LJ giving the lead judgment in the Court of Appeal at paragraph 7 as follows:

“The employment tribunal’s power to order costs is more sparingly exercised and is more circumscribed by the employment tribunal’s rules than that of the ordinary courts. There the general rule is that costs follow the event and the unsuccessful litigant normally has to foot the legal bill of the litigation. In the employment tribunal costs orders are the exception rather than the rule. In most cases the employment tribunal does not make any order for costs.”

15. Vexatious, abusive, disruptive, or unreasonable conduct of proceedings was considered in the case of Scott v Russell [2013] EWCA Civ 1432; [2014] 1 Costs L.O. 95 (12 November 2013) Beatson LJ, giving the judgment of the Court of Appeal, cited with approval the definition of “vexatious” given by Lord Bingham in Attorney General v Barker [2000] 1 F.L.R. 759 (16 February 2000). That definition is as follows:

“The hallmark of a vexatious proceeding is in my judgment that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceeding may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant; and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process.”

16. According to the EAT in Dyer v Secretary of State for Employment EAT 183/83 (20 August 1983), “unreasonable” has its ordinary English meaning and is not to be interpreted as if it means something similar to “vexatious”. It will often be the case, however, that a tribunal will find a party’s conduct to be both vexatious and unreasonable. The Court of Appeal in Yerrakalva at paragraph 41 commented that it was important not to lose sight of the totality of the circumstances.

17. A party’s lies may be the basis of an allegation of vexatious or unreasonable conduct. In this regard, in the case of Arrowsmith v Nottingham Trent University [2011] EWCA Civ 797; [2012] I.C.R. 159 (10 June 2011) the Court of Appeal approved of the following passage in HCA International Ltd v May-Bheemu EAT 0477/10 (23 March 2011):

“39. Thus, a lie on its own will not necessarily be sufficient to found an award of costs. It will always be necessary for the tribunal to examine the context and to look at the nature, gravity and effect of the lie in determining the unreasonableness of the alleged conduct.

“40. As this last case makes abundantly clear, no point of principle of general application is established in any of the cases being relied upon by Mr Beyzade [and they included the Daleside case]. In our judgment the employment tribunal’s reasoning in the present case, at para 12 of their judgment, is unimpeachable. Where, in some cases, a central allegation is

found to be a lie, that may support an application for costs, but it does not mean that, on every occasion that a claimant fails to establish a central plank of the claim, an award of costs must follow.”

18. In Kapoor v Governing Body of Barnhill Community High School EAT 0352/13 (12 December 2013) the Employment Appeal Tribunal confirmed that costs should not automatically be awarded simply because a party has knowingly given false evidence. As Pill LJ noted when giving the lead judgment in the Court of Appeal case of Lodwick v Southwark London Borough Council 2004 ICR 884 (18 March 2004), it remains a fundamental principle that the purpose of an award of costs is to compensate the party in whose favour the order is made, and not to punish the paying party. Given that costs are compensatory, it is necessary to examine what loss has been caused to the receiving party. In this regard in the case of Yerrakalva at paragraph 54 Mummery LJ held that costs should be limited to those *‘reasonably and necessarily incurred’*.
19. Ability to pay is a relevant factor for the Tribunal to consider. The Employment Tribunal Procedure Rules rule 84 provides as follows in relation to ability to pay:
- ‘84. 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 [...] ability to pay.’*
20. A tribunal is not obliged by rule 84 to have regard to ability to pay — it is merely permitted to do so. That said, in Benjamin v Interlacing Ribbon Ltd EAT 0363/05 (1 November 2005) the EAT held that where a tribunal has been asked to consider a party’s means, it should state in its reasons whether it has in fact done so and, if it has, how this has been done. As noted by the EAT in Howman v Queen Elizabeth Hospital Kings Lynn EAT 0509/12 (30 April 2013) at paragraph 13, any tribunal when having regard to a party’s ability to pay needs to balance that factor against the need to compensate the other party who has unreasonably been put to expense. The former does not necessarily trump the latter, but it may do so.

Findings of fact

21. The findings of fact relevant to this costs application are set out in the Reasons dated 5 April 2022, and summarised in paragraph 4 of this Judgment.
22. At the direction of the Tribunal the Respondent’s application for strike out of Miss Vosper’s claim was listed at the start of the full merits hearing.
23. Rule 77 requires the application to be made *‘up to 28 days after the date on which the judgment finally determining the proceedings in respect of that party was sent to the parties’*. The Respondents solicitors made the application for costs on 6 May 2022; Judgment was sent to the Claimant and Respondent on 10 April 2022; the application is in time.
24. On 5 July 2022 Miss Vosper was ordered to prepare and serve a witness statement setting out details of her income, outgoings, capital assets including savings, debts and liabilities, accompanied by supporting copy documentation as evidence of her means. She had 28 days to do so. Up to the date of the costs hearing she had not filed any evidence as to her means, nor did she attend the hearing. This is a further example of her failure to comply with an order of the Tribunal. I note the comments of Judge Warren: *‘The fact that she*

has been unrepresented, (and that the Respondent is represented) is no excuse; she was aware of what was required of her and she chose not to comply and she chose to ignore correspondence. She has chosen not to cooperate with the Respondent's solicitors and the tribunal.' These comments are equally applicable to the order to produce evidence to assist the Tribunal in determining Miss Vosper's ability to pay any costs order. She has failed to produce any evidence as to her financial position. Therefore, I find that she has the means to pay.

Conclusions

25. The decision to make a costs order is the exception rather than the rule. The test for imposition of a costs order under rule 76(1) is a two-stage test: first, a Tribunal must ask itself whether a party's conduct falls within rule 76(1); if so, it must go on to ask itself whether it is appropriate to exercise its discretion in favour of awarding costs against that party.
26. It is clear Miss Vosper's conduct falls within Rule 76(1). In his Judgment dated 28 March 2022 Judge Warren determines that the *'Claimant's claim is struck out on the grounds that the Claimant's conduct of these proceedings has been vexatious and unreasonable'*; the findings of fact in support of this conclusion are multiple and set out the Reasons dated 5 April 2022. I agree. The threshold as to whether Miss Vosper has acted vexatiously or otherwise unreasonably in her conduct of the proceedings has clearly been satisfied under rule 76(1)(a).
27. The Respondent further submits that Miss Vosper breached multiple orders (rule 76(2)). She did, as the findings of Judge Warren summarised at paragraph 4 of this decision evidence. Indeed, she has also failed to comply with an order to submit evidence for this costs hearing, which was issued after the Reasons. On balance, I conclude that the first part of the test is satisfied.
28. Therefore, I must go on to ask itself whether it is appropriate for the Tribunal to exercise its discretion in favour of awarding costs against Miss Vosper. In deciding whether to make an order for costs I may have regard to the paying party's ability to pay. Indeed, this door was opened for me by the order of Judge Warren, directing Miss Vosper to provide evidence of her financial. He provides clear guidance as to how she should do so. She has not done so, therefore I draw on the guidance of Judge Warren below.

'If the claimant fails to comply with this order in any way, including the supply of insufficient evidence as to her means, the Employment Judge hearing the application may draw adverse inferences, including that the claimant has sufficient means to meet the liability of any costs order.'
29. There is no evidence before me as to Miss Vosper's financial means, despite being clearly and precisely directed to provide such evidence; this draws me to the conclusion that she is able to pay otherwise she would have submitted evidence to the contrary.
30. I bear in mind that it is exceptional to make a costs order in the Tribunal. However, the fault in the conduct of this case lies entirely with the Miss Vosper. Her actions, including ignoring the opportunity to produce evidence as to her financial position, invariably lead to the conclusion this case is one of the

exceptions. Judge Warren's findings on Miss Vosper's conduct in this case caused the Respondent to incur unnecessary costs.

31. I also bear in mind that relevant to my discretion in making an order for costs is the fundamental principle that the purpose of an award of costs is to compensate the party in whose favour the order is made, and not to punish the paying party. Again, if I had evidence as to ability to pay, I would take this into account. It was Miss Vosper's choice not to assist the Tribunal with such evidence. Therefore, I must consider what costs are involved, and limit any award to *'those reasonably and necessarily incurred'* [*Yerrakalva v Barnsley Metropolitan Borough Council and anor* [2021] ICR 420, CA].
32. As Miss Vosper did not respond to the opportunity to provide this and will have had sight of the respondent's schedule of costs as this was served on her, I have concluded she does have the ability to pay. There is no evidence before the Tribunal on which it could be concluded that Miss Vosper cannot pay any costs award. In any event given the seriousness of the Claimant's conduct, and the fact that the Respondent has unreasonably been put to the expense of preparing for a full trial, it would still be appropriate to make an order for costs. As such, an order for costs will be made.

Costs award

33. In assessing amount, I apply the rule that costs are compensatory not punitive. Given this rule, it is necessary to examine what loss has been incurred by the receiving party. Much of the time incurred is preparation time. I have reviewed the Tribunal file; while Miss Vosper's refusal to engage with the Respondent's solicitor, or copy correspondence, invariably resulted in an additional burden in correspondence, I consider a fee of £3,660.40 for preparation and £405.30 for telephone calls considerable. Not all of this will flow directly from the conduct of Miss Vosper. I consider it fair and just to reduce these amounts by 50%. I consider that, given Miss Vosper's failure to actively engage with the proceedings, or disclosure materials, the onus was on the Respondent's witnesses to provide all information. Therefore, I award the fee claimed for attendance conference with witnesses in full (£595.00).
34. Also, a factor was the listing by the Tribunal that if the strike out application was not successful, the case would proceed to a full merits hearing. This was in part the reason that the Respondent had to incur costs to prepare for full trial. I consider the amount of time charged for preparation of a 254-page bundle and 2 short witness statements considerable. I consider this should be reduced by 50%. I award £3,155.85.
35. The Respondent's fee for attending the hearing on 28 March 2022 was well below a reasonable level. Therefore, I award the full amount of £1,000.00.
36. By letter dated 14 September 2022 the Tribunal directed that the hearing on 20 September 2022 would remain in person. The hearing did not last for the listed time. Therefore, I do not consider it reasonable to award the costs of the Respondent's representative travelling to and attending this hearing against Miss Vosper.

37. As such, I order the Claimant to pay a total of £6,783.70 inclusive of VAT composed of:

- 37.1. £1,830.20 in respect of correspondence;
- 37.2. £202.65 in respect of telephone calls;
- 37.3. £3,155.85. in respect of solicitors' fees for preparation for trial of this claim;
- 37.4. £595 for attendance of witnesses; and
- 37.5. £1,000 in respect of fees of attending the hearing; and

Employment Judge **Hutchings**

20 September 2022

JUDGMENT & REASONS SENT TO THE PARTIES ON

22 September 2022

FOR THE TRIBUNAL OFFICE