



EMPLOYMENT TRIBUNALS

Claimant: Ms J Ashall
Respondent: Greater Manchester Business Support t/a The Growth Company
Heard at: Manchester Employment Tribunal, in person
On: 27 September 2022
Before: Employment Judge Mark Butler

Representation

Decided in chambers, on the papers

JUDGMENT

1. The claimant is ordered to pay the respondent costs in the amount of £2,000.

REASONS

Introduction

2. In a full reasoned oral decision on 17 August 2022, the Employment Tribunal dismissed the claimant's claims for automatic unfair dismissal. In short, the claimant failed to establish that she had made any protected disclosures.
3. The respondent applied for costs pursuant to rule 75(1) and 76(1)(a) and 76(1)(b) of the Employment Tribunal rules 2013 (ET Rules). This was first done orally at the end of the liability hearing. And then in writing, at the direction of the tribunal. This was to enable Ms Ashall some time to formulate her response to the application, and was considered by the judge to be a fair approach to adopt in the circumstances.
4. The parties agreed to the costs application being determined on the papers without a hearing.
5. Directions were sent out to the parties to ensure that submissions and any relevant

evidence was before me today. This included a direction for the claimant to present to the tribunal a statement of financial means and evidence of incomings and outgoings, if the claimant wanted me to take into account her financial means when determining the costs application.

The Rules and applicable principles

6. Costs orders and preparation time orders are defined at Rule 75(1) of the ET rules:

Rule 75(1) A costs order is an order that a party (“the paying party”) make a payment to

- (a) 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;
- (b) the receiving party in respect of a Tribunal fee paid by the receiving party; or
- (c) 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.

(2) A preparation time order is an order that a party (“the paying party”) make a payment to another party (“the receiving party”) in respect of the receiving party’s preparation time while not legally represented. “Preparation time” means time spent by the receiving party (including by any employees or advisers) in working on the case, except for time spent at any final hearing.

(3) A costs order under paragraph (1)(a) and a preparation time order may not both be made in favour of the same party in the same proceedings. A Tribunal may, if it wishes, decide in the course of the proceedings that a party is entitled to one order or the other but defer until a later stage in the proceedings deciding which kind of order to make.

7. The circumstances in which a costs order or preparation order are provided for by Rule 61 of the ET rules. This includes

Rule 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) 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.

...

8. Rule 78 of the ET rules explains the amount that can be ordered in relation to costs

Rule 78(1) A costs order may-

- (a) order the paying party to pay the receiving party a specified amount,

not exceeding £20,000, in respect of the costs of the receiving party;

- (b) order the paying party to pay the receiving party the whole or a specified part of the costs of the receiving party, with the amount to be paid being determined, in England and Wales, by way of detailed assessment carried out either by a county court in accordance with the Civil Procedure Rules 1998, or by an Employment Judge applying the same principles; or, in Scotland, by way of taxation carried out either by the auditor of court in accordance with the Act of Sederunt (Fees of Solicitors in the Sheriff Court)(Amendment and Further Provisions) 1993(23), or by an Employment Judge applying the same principles;
- (c) order the paying party to pay the receiving party a specified amount as reimbursement of all or part of a Tribunal fee paid by the receiving party;
- (d) order the paying party to pay another party or a witness, as appropriate, a specified amount in respect of necessary and reasonably incurred expenses (of the kind described in rule 75(1)(c)); or
- (e) if the paying party and the receiving party agree as to the amount payable, be made in that amount.

(2) Where the costs order includes an amount in respect of fees charged by a lay representative, for the purposes of the calculation of the order, the hourly rate applicable for the fees of the lay representative shall be no higher than the rate under rule 79(2).

(3) For the avoidance of doubt, the amount of a costs order under subparagraphs (b) to (e) of paragraph (1) may exceed £20,000.

9. Rule 84 of the ET rules provides the tribunal with discretion in relation to the ability of the paying party to pay a costs award. It provides that '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.
10. The Court of Appeal confirmed in **Gee v Shell UK Limited [2003] IRLR 82** that costs are the exception rather than the rule and that costs do not follow the event in Employment Tribunals.
11. It was explained in **Barnsley Metropolitan Borough Council v Yerrakalva [2012] ICR 420** that "*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 it had.*"
12. It was confirmed by the EAT in **Vaughan v London Borough of Lewisham & Ors UKEAT/0533/12/SM** that it was not wrong in principle to make a costs order even though no deposit order had been made and the respondents had made a substantial offer of settlement (on an avowedly "commercial" basis). Nor was it wrong in principle to make an award which the claimant could not in her present financial circumstances afford to pay where the Tribunal had formed the view that she might be able to meet it in due course.

13. At paragraph 52 in **Millan v Capsticks Solicitors LLP & Others UKEAT/0093/14/RN**, the then President of the EAT, Langstaff J, described the exercise to be undertaken by the Tribunal as a 3 stage exercise:

“There are thus three stages to the process of determining upon a costs order in a particular amount. First, the tribunal must be of the opinion that the paying party has behaved in a manner referred to in Rule 40(3); but if of that opinion, does not have to make a costs order. It has still to decide whether, as a second stage, it is “appropriate” to do so. In reaching that decision it may take account of the ability of the paying party to pay. Having decided that there should be a costs order in some amount, the third stage is to determine what that amount should be. Here, covered by Rule 41, the tribunal has the option of ordering the paying party to pay an amount to be determined by way of detailed assessment in a county court.”

14. Tribunals must take into account all of the relevant matters and circumstances when deciding on costs applications. The fact that a party is unrepresented is a relevant consideration. 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. The threshold tests may be the same whether a party is represented or not, but the application of those tests should take account of whether a litigant has been professionally represented or not (**AQ Limited v Holden [2012] IRLR 648**).
15. If the means of a paying party in any costs award are to be taken into account, the Tribunal should set out its findings about ability to pay and say what impact this has had on the decision whether to award costs or an amount of costs. (**Jilley v Birmingham & Solihull Mental Health NHS Trust UKEAT/0584/06**).

Application for costs

16. The respondent made its application for costs on two grounds.
17. First, that the claimant had acted unreasonably in bringing her claim. And secondly, that the claim had no reasonable prospects of success.
18. In terms of the claimant acting unreasonably, the respondent submits that the claimant was fixated on trying to uncover the identity of the person who complained about her tweets, rather than on the issues in this case. This was present throughout the proceedings. That the respondent made commercial offers of £2,000, which were unreasonably refused.
19. In respect of prospects of success, it is submitted by the respondent that he approach to the proceedings was to focus on matters that were outside of the issues before the tribunal. With a focus on other disclosures and the identity of the complainant. This failure to focus on the issues in her case, meant that the claims had no reasonable prospects of success. There is clear overlap between the two grounds presented.
20. The respondent did serve a costs warning letter on the claimant.
21. The respondent contends that it is only seeking a contribution to its legal costs, which is less than 5% of its costs. It has capped its application to £2,000.

Claimant's written submissions opposing application for costs

22. The claimant sent her submissions by email dated 05 September 2022. This included the following:
- a. The disclosures that the claimant made included threats of violence & being told that she would never be allowed to work again in Manchester.
 - b. That the same persons used their influence again resulting in her dismissal from a partner organisation in June 2022.
 - c. That the claimant is not currently working and so not in a position to pay
 - d. That if a costs award is made, that she hopes that payment can be over a reasonable period and should only commence 30 days after she returns to full time employment
23. The final two paragraphs of the claimant's email focus on the tweets that she had posted (and subject to a complaint), amongst other things.
24. The claimant has not produced a statement as to her financial means, nor any evidence in respect of her incomings and outgoings.

Discussion and conclusion

25. I do find that the claim for automatic unfair dismissal had no reasonable prospects of success. On the claimant's own evidence, the decision to dismiss pre-dated 3 of the disclosures on which the claimant was relying. These could in no way have influenced the decision to dismiss her given this.
26. With respect the remaining two disclosures, the claimant has produced nothing (including in her own witness statement) that would support a finding of a disclosure of information. Nor did she draw any causal connections between any such alleged disclosure and the decision made. In short, this claim was a weak claim, and one that had no reasonable prospects of success from the outset.
27. Even had I not found that the case had no reasonable prospects of success, I was further satisfied that the claimant had acted unreasonably in the way that the case has been brought. The claimant throughout this process has had a focus on the name of the person who complained about her tweet posts, and retained this focus at the expense of focussing on matters relevant to this case. This appeared to be the focus behind why the claimant brought the claim that she did, especially given the comments made above on the weakness of the claim. This was evident throughout this process. It was raised in correspondence with the tribunal, it was raised at the preliminary hearing before me at the Preliminary Hearing on 08 November 2021, it was raised at the beginning of the liability hearing, it was raised in final submissions and it has again been raised in the email from the claimant responding to the respondent's application for costs.
28. In respect of the claimant's finances, the only information I have before me is that the claimant states that she is not currently working, which is consistent with what she had explained to me at the liability hearing. I have no other information from which to make an assessment of the claimant's ability to pay. This is despite having directed the claimant to produce a statement and supporting evidence on her financial means, should she want to invite the tribunal to take it into account.
29. When deciding whether to exercise my discretion to award costs, I have taken into account the claimant's employment position, and have balanced this against my conclusions in respect of the claimant's behaviour and prospects of success. I have concluded that it appropriate to make a costs order in these circumstances.

30. I have considered all of the circumstances, including that the claimant is currently unemployed, and decided to make a costs award in the amount of £2,000. This is a contribution to the costs incurred by the respondent that exceeds £20,000.
31. It is a matter for the parties to consider how this is to be paid. Should they wish to agree some form of payment plan, that is a matter for them.

Employment Judge **Mark Butler**
Date 27 September 2022_____

JUDGMENT SENT TO THE PARTIES ON
3 October 2022

FOR THE TRIBUNAL OFFICE

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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