Case number: 1400854/2021

EMPLOYMENT TRIBUNALS

Claimant: **Mrs Y Hinch**

Respondent: **Mrs L Trill t/a Thairapy Hair Design**

Heard at: **Bristol Employment Tribunal**

On: **13 October 2022**

Before: **Employment Judge Lowe**

Representation-

Claimant: **Island Advocacy (written submissions)**
Respondent: **Real Employment Law Advice (written submissions)**

COSTS HEARING

Issue for Determination

The Tribunal is considering the Respondents applications for costs, pursuant to Rules 76 and 80 of the Employment Tribunal Rules of Procedure 2013 ("ET Rules").

Evidence

The Tribunal has been provided with the following documentation:
Claimant's written submissions **[CWS]**
Respondent's written submissions **[RWS]**
Respondent's costs hearing bundle **[B]** comprising 120 pages

References in this Judgment to documents are in the form **[Document/page number]**.

Background

A Final Hearing determination was held on 25 to 27 July 2022 in relation to the Claimant's claims for unfair dismissal and holiday pay. Both claims were dismissed by the Tribunal.

Following Judgment, the Respondent made an oral application for costs pursuant to Rule 76 of the ET Rules in respect of the Respondent's costs of defending the proceedings (referred to as "the Second Costs Application"). This was in addition to an earlier written application, dated 22 July 2022, for a costs order in accordance with Rules 76 and 80 of the ET Rules ("the First Costs Application").

Following representations, the Tribunal directed written submissions be provided to the Tribunal in respect of both applications and the matter re-listed before me at the first available date thereafter.

Relevant statutory framework:

General Principle
Costs in Tribunal claims are the exception, rather than the rule. There is a high hurdle to be established before the Tribunal can consider making any such order: Gee v Shell UK Ltd [2003] IRLR 82.

The circumstances in which a costs order or preparation time order may be made are provided for by Rule 76 Employment Tribunals 2013 (ET Rules), which so far as is relevant to this application provides:

"(*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; or…

(2) A Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party".

In addition, Rule 80 provides:

"(1) A Tribunal may make a wasted costs order against a representative in favour of any party ("the receiving party") where that party has incurred costs—

(a) as a result of any improper, unreasonable or negligent act or omission on the part of the representative; or

(b) which, in the light of any such act or omission occurring after they were incurred, the Tribunal considers it unreasonable to expect the receiving party to pay.

Costs so incurred are described as wasted costs".

Summary of the Respondent's position-

In broad terms, the Respondent's applications are as follows:

First Costs Application

The Respondent's first application, dated 22 July 2022, is in respect of the:
'additional costs that the 'Respondent has incurred as a result of the Claimant's/ the Claimant's representative's persistent failure to comply with the Case Management Order dated 1 October 2021 (CMO) and the unreasonable manner in which they have conducted these proceedings, culminating in the last minute withdrawal of her discrimination claim and even later application to convert the hearing to a CVP. We attach a Schedule of the additional work undertaken, and the corresponding costs incurred by the Respondent as a result of this unreasonable conduct' [B/96].

Second Costs Application

The Respondent requests that the Tribunal exercise its discretion under 76(1) ET Rules to make a costs order against the Claimant for the Respondent's costs of defending the proceedings on the ground that:

1. the Claimant acted vexatiously, abusively, disruptively or other unreasonably in bringing the proceedings and/or in the way the proceedings were conducted; and/or in the alternative,
2. that the Claimant's claims had no reasonable prospect of success.

Summary of the Claimant's position-

In similar broad terms, the Claimant avers that:

1. There should be no order as to costs, as is the usual position in the Employment Tribunal. The test for awarding costs in the Tribunal is high, the exception and not the general rule.
2. At the relevant time, the Claimant's claim did have a reasonable prospect of success and she did not act unreasonably in pursuing his claim; character and good name being relevant factors for the claim.
3. The Tribunal should have regard to the Claimant's ability to pay in accordance with Rule 84, and that if any award of costs is made, that is should be against the Claimant's representative and not Claimant.

Findings of the Tribunal

Text Messages

My findings from the Hearing are detailed below:

"*It is common ground that on the evening of Sunday 25 October 2020, the Respondent received 41 text messages (within a 45-minute timeframe) from Mr Hinch. These appear within the bundle at [98-103].*

I find these text messages not only threatening and abusive, but wholly abhorrent.

I further find that as a result, the Respondent experienced a mental and physical reaction and this compromised her health and well-being.

Further, that the matter was referred to the police. A warning was issued to Mr Hinch by the police after the Respondent determined not to press charges.

The issue in dispute here relates to the knowledge of the Claimant in respect of these messages. I conclude as follows:

The Claimant has confirmed that Mr Hinch was actively aware of all discussions, correspondence and conversations in respect of this matter; he was present during telephone calls to ACAS. This is of course, only reasonable and to be expected in all the circumstances given the familial relationship between the parties.

The messages themselves use joint terms of reference – 'we', 'so you realise your friendship has gone'. It refers to the employment relationship, demonstrates a knowledge of the latest stage of the proceedings and outlines the prospect of the next action that might be taken by the Claimant. The timing of the messages is also important, they arrive 2 days before the last communication sent by the Claimant to the Respondent, having consulted with ACAS. Matters have become more 'formal' at this stage; the Claimant not having been successful in securing her request for payment whilst self-isolating or payment for the covid test.

In those circumstances, I find that it was entirely reasonable that the Respondent viewed these messages as representing her position and that they were made on her behalf.

What I do not find credible is the Claimant's suggestion that she did not have knowledge of these messages until some months later. Her explanation to the Tribunal that she stumbled across the police letter whilst cleaning is, quite simply, fanciful. It is incredulous to suggest that, in the light of dismissal, this would not have been known to the Claimant in the light of the circumstances I have outlined".

Applying these findings to the question of costs, I note the following:

It is incontrovertible that the messages were sent by the Claimant's husband and were of an abusive and threatening nature. Importantly, however, there was no suggestion by either party, or finding made, that the Claimant had either requested her husband to send them, or that she was complicit in the writing of them. The acknowledged position, which I accepted, was that he had done so unilaterally, with the Claimant becoming aware of Mr Hinch's actions a short time thereafter.

The evidence of the Claimant was that her husband was most likely intoxicated at the time these were sent. The incoherent, illogical and random presentation of these messages support this. When viewed objectively, the messages are irrational and wholly without substance. The suggestion that a claim of this kind would give rise to some of the consequences outlined, is clearly without foundation. Mr Hinch's assertion that he was in funds in the sum of twenty thousand pounds is a further example of the incredulous nature of these claims.

The Respondent relies on these messages in support of her assertion 'that, from the outset, the Claimant's motive for bringing the proceedings against the Respondent and for conducting the proceedings in the way she did, was to make sure that the Respondent incurred '1000s' of costs [RWB/5].

Further, the Respondent submits that the Claimant pursued these proceedings with 'little or no expectation of succeeding or receiving compensation but with the intent of putting into action the threats that her husband made to the Respondent' [RWB/5].

The timeline and actions of the Claimant prior to instigating proceedings are important:

The date of the initial text messages, 20 October 2020, was followed shortly thereafter by the date of termination, 16 November 2021.

The messages were sent after ACAS had already been consulted.

The messages were sent following an unsuccessful attempt by the Claimant to secure funding for a Covid test. They were reactionary in nature in the light of this specific decision.

The claim was presented to the Tribunal on 15 February 2021, approaching three months after the messages were sent. In the interim period, the Claimant sought legal advice, costing £500. There was a period of consideration and a recognition that advice was required.

I cannot therefore conclude that the text messages, in and of themselves, are determinative of an improper motivation for bringing and pursuing these proceedings. The more significant factors were the advice of her representative and ACAS.

<u>Discrimination claim</u>

A Case Management Preliminary Hearing was conducted by Regional Employment Judge Pirani on 14 September 2021. The Claimant was represented by Ms Cook at this hearing, whilst the Respondent was 'In Person'.

The list of claims and Issues outlined in the resultant CMO, dated 1 October 2021, were as follows:

"By a claim form received at the Tribunal on 15 February 2021 the claimant brought claims for:

1. Unfair dismissal
2. Age discrimination

3. Redundancy payment (clarified today that this is withdrawn)
4. Holiday pay

Paragraph 11 outlines:

"The claims and issues, as discussed at this preliminary hearing, are listed in the Case Summary below. If you think the list is wrong or incomplete, you must write to the Tribunal and the other side by 29 October 2021. If you do not, the list will be treated as final unless the Tribunal decides otherwise" [B/36].

No such correspondence was received by the Tribunal or the Respondent, and as such, the claims outlined were confirmed as those being pursued. In view of this, the Respondent wrote to the Claimant's representative on 1 November 2021 [B/40] putting the Claimant on notice that, should she continue to pursue her claims for unfair dismissal and age discrimination, the Respondent would make an application for costs. Specifically, it stated:

"Your client's claims, particularly in respect of age discrimination have absolutely no substance, particularly as your client has failed to satisfy the test for age discrimination. Further, at no point during your employment did your client raise any concerns relating to potential discrimination" [B/40].

Despite this warning, the Claimant did not inform the Respondent of the fact that she was not pursuing her age discrimination claim until 21 July 2022, two working days prior to the Final Hearing. The Judgment of the Tribunal recording this position is dated 22 July 2022.

The Claimant's representative suggests that there was an error in the record of the CMO. The Claimant's representative states that "the claim for age discrimination was dropped at the pre-trial hearing" [B/81] and that the "CMO barely reflects the hearing at all" [B/84]. This is disingenuous and plainly incorrect.

Even if the position were different and there was an error on the CMO, it would have been incumbent on the Claimant to notify the Tribunal and the Respondent by 29 October 2021 of this. The Claimant did not do this.

The Respondent had prepared its case on the basis that it was required to defend the claim. It provided a detailed response to the claim in the Amended Grounds of Resistance and instructing counsel on the point. Unnecessary costs were incurred as a result. Tribunal members allocated to consider this matter were stood down at short notice.

Hearing Bundle

Paragraph 18 of the CMO outlines:

"The Claimant will have primary responsibility for the creation of the single joint file of documents required for the Hearing" [B/37].

Paragraphs 19 and 20 outlined the timescales for this task to be undertaken. In summary, the document index was to be agreed by 7 January 2022, with a hard copy file of the index

documents being prepared by the Claimant (and provided to the Respondent) by 21 January 2021.

The Hearing Bundle was provided to the Respondent on 20 July 2022, 5 days prior to the commencement of the Final Hearing [B/79]. This was six months after the CMO directed.

In the interim, numerous attempts were made by the Respondent to obtain the Hearing Bundle –

Letter of 10 February 2022 [B/45] providing a draft bundle index for approval and a proposed timeframe for agreement;

Letter of 21 February 2022 [B/46] copied to the Claimant indicating that no response had been received in response to the above correspondence;

Email of 4 March 2022 [B/50] clarifying Respondent's position and requesting response to the draft bundle index already provided;

In view of the non-compliance with the CMO, it became necessary to refer the matter to the Tribunal, incurring further expense, time and public resource. A further Case Management Order was issued on 23 March 2022 [B/52]. This provided confirmation of the 3-day hearing listing and stated:

"The parties are reminded that they must comply with case management orders and must co-operate with one another to prepare the case for hearing.

In this case, the next step is to ensure that the bindle is agreed and provided and the parties are ordered to both respond to the ET by return to confirm either that this has now happened, or to provide an agreed suggestion for variation to the existing case management orders to ensure it takes place within the next 14 days; by 6 April 2022" [B/52].

By way of email dated 30 March 2022, the Respondent provides a further, slightly amended draft index seeking agreement by return. The email includes the following:

"Please note that due to the deadline set by the Employment Tribunal and your client's previous delays and failures to respond to my correspondence, if I do not receive a substantive response by **5pm on Monday 4 April 2022**, I will take your silence on the matter as your agreement to the attached trial index and will confirm the same to the Employment Tribunal" [B/53].

On 5 April 2022 the Respondent confirmed to the Tribunal that, as no response had been received, the Hearing Bundle was therefore agreed, and the matter could proceed as per the CMO dated 14 September 2021.

Regrettably, this still did not resolve matters and correspondence further ensued until the final, paginated bundle was provided to the Respondent on 20 July 2022. This was 3 working days before the commencement of the Final Hearing.

This undoubtedly hampered the Respondent's preparations for the Hearing, referencing was compromised, and additional costs incurred.

Schedule of Loss

Despite numerous and repeated requests, the Claimant failed to provide an updated Schedule of Loss. At the Final Hearing, this was not forthcoming, despite reassurances to the contrary.

The Respondent was entitled to know in advance (and have the opportunity to respond) how the Claimant had calculated her loss. This was especially relevant as the Claimant's losses and employment position post termination required clarification – there were concerns in relation to set up costs, cash earnings and working hours.

Had the Tribunal found that the Claimant's claim was made out, this omission posed a real possibility that the matter could not have been concluded within the allocated timeframe.

Holiday Pay claim

The CMO outlines that the generic nature of the claim, namely, whether the Respondent failed to pay the Claimant for annual leave accrued but not taken before their employment ended [B/43].

The particulars of this claim were not provided to the Respondent or the Tribunal until the Final Hearing. At the Final Hearing, the Claimant outlined that the claim related to one day's holiday pay, 6 October 2020, when the salon was closed at the instigation of the Respondent.

On 26 July 2022 (15:47), the Respondent provided the Claimant with: October 2020 payslip (5.10.22 – 5.11.20) and a screenshot of the holiday tracker calculation [B/105-106]. This evidenced that the Claimant received 48 hours holiday pay, with the tracker confirming actual entitlement to be 47 hours. In effect, the Claimant was overpaid by one hour.

Upon receipt of these documents, and in the absence of any evidence to the contrary, it was unreasonable for the Claimant to pursue the matter from this point onwards. Instead, the matter was left for the Tribunal to determine incurring additional time and consideration.

Application to convert to CVP hearing

The Claimant applied to the Tribunal on 22 July 2022 to convert the hearing to CVP. It did so on the grounds that the Claimant was using a wheelchair, having sustained a fracture to her ankle, and disruption to the Red Funnel Ferry service [B/91].

However, the Claimant broke her foot a number of weeks prior to the Final Hearing [B/74]. Monitoring the progress of this injury, being mindful of the approaching Hearing date, would have been a reasonable and expected course of action. It appears to me that this was not done. The more likely explanation for the application is outlined by the Claimant's representative in an email sent one working day before the commencement of the Hearing. It outlines:

"I am wholly responsible for working under the apprehension that this was a remote hearing" [B/95].

All documentation sent by the Tribunal was clear that the matter was an 'Attended Hearing'. The error was solely that of the Claimant's representative.

The consequence to the Tribunal, other cases and the Respondent was significant. The Tribunal had arranged an attended hearing, with Tribunal personnel scheduled to attend at Southampton. Other cases awaiting an attended hearing might have been accommodated, and the Respondent's representative had made travel arrangements and booked a hotel.

Retraction of Agreement in relation to Bundle contents

The Claimant agreed, on or around 10 June 2022, that the risk assessment provided by the Respondent could be incorporated into the Hearing Bundle [B/76]. This agreement was subsequently retracted by the Claimant, on 20 July 2022, on the basis that the Respondent had refused to agree the inclusion of a further document sought by the Claimant. The Claimant's representative outlines that:

"..as this level of co-operation is not being reciprocated it seems only fair that both sides argue for the extra disclosure. I think it is particularly important as my client has never seen the risk assessment and your client was the author of the text message" [B/80].

I disagree with such a 'tit-for-tat' approach. The decision as to the Hearing Bundle Index/contents is specific to each document. Each requires separate and appropriate consideration as to its relevance and evidential value. One decision is not determinative of future potential applications.

As such, in my view, it was unreasonable for the Claimant's representative to reverse an agreed position made a month previously on the basis that the Respondent did not agree to a subsequent application.

The timing of the reversal was also significant. It was 3 working days before the commencement of the Final Hearing, leaving the Respondent no realistic option other than to apply to the Tribunal for inclusion of this document. Since the 10 June 2022, the Respondent had prepared its case on the basis that this document would be included. It necessitated additional Tribunal time in considering this application.

Conclusions

I have considered and applied the Overriding Objective in determining this matter. Further, I have also considered that the criteria in Rule 76 and 80 both include the question of 'unreasonable conduct/act or omission' and the 'General Principle' in awarding costs as outlined above.

Unreasonable conduct is a matter of fact for the Tribunal. In exercising discretion to order costs, the Tribunal has been referred to the Court of Appeal's guidance as set out in

Barnsley Metropolitan Borough Council v Yerrakalva [2012] IRLR 78, paragraph 41, which stated:

"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 binging and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had".

In view of my findings outlined above, I conclude that the Claimant's representative acted unreasonably in the way the proceedings have been conducted after the CMO was issued on 1 October 2021. Each primary aspect of conduct has been identified and its effects detailed.

I do not conclude that the proceedings in relation to the unfair dismissal claim had no reasonable prospect of success or that they were brought vexatiously, abusively, disruptively or otherwise unreasonably. The Claimant sought and acted upon advice from ACAS and her legal representative before initiating proceedings.

In summary, there have been repeated and numerous failures to comply with the CMO which have necessitated additional costs to the Respondent, additional public resource, inconvenience to the Respondent/Respondent's representative and Tribunal staff. I attribute these failures to be that of the Claimant's representative.

It is only fair and equitable, in accordance with the Overriding Objective, for any costs arising from this incurred by the Respondent to be paid by the Claimant's representative. It would be unreasonable to expect the Respondent to pay for this conduct.

I therefore award costs in accordance with the Claimant's First Application for Costs in the sum of £1,686.00. This accords with the additional cost incurred by the Respondent as a result of the Claimant's representative's conduct of the case.

Conclusion-

The Tribunal makes a Costs order for the Claimant's representative to pay the Respondent the sum of **£1,686.00.**

Employment Judge Lowe
Date 19 October 2022

Judgment sent to parties on:
24 October 2022 By Mr J McCormick

For the Tribunal Office