



EMPLOYMENT TRIBUNALS

Claimant: Mr H Jani

Respondent: Elis UK Ltd

Heard at: Croydon on the papers

On: 23 January 2023

Before: Employment Judge Wright

JUDGMENT

The respondent's costs application succeeds. The claimant is to pay to the respondent the sum of £1,000.00 plus vat.

REASONS

1. At the hearing on the 30th September 2022 the respondent's strike out application was successful for the reasons given.
2. On the 19th October 2022 the respondent made an application under Rule 76 that the claimant be ordered to pay its costs. The sum sought was £8,127.00. This was inclusive of VAT.
3. The claimant was directed to provide evidence in respect of his ability to pay any costs ordered. He provided a breakdown of his income and outgoings, but he did not provide any commentary in respect of his ability to pay.
4. Costs do not 'follow the event' in Tribunal claims. In other words it is not usual practice for the loser to pay the winner's costs. Costs in the Employment Tribunal are still the exception rather than the rule (Yerrakalva v Barnsley Metropolitan Borough Council 2012 ICR 420, CA). Furthermore, the fundamental principle is 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.
5. The Employment Tribunal is created by statute and the procedure is governed by the Rules. Any application for costs must be made pursuant

Case Numbers: 2305725/2019 and 2300051/2020

to those Rules. The relevant Rules in respect of the application are Rules 74(1), 76(1), 77, 78(1)(a) and 84. They state:

74 (1) “Costs” means fees, charges, disbursements or expenses incurred by or on behalf of the receiving party (including expenses that witnesses incur for the purposes of or in connection with attendance at a tribunal hearing).

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.

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.

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.

6. In deciding whether to make a cost, 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.
7. Rule 76 imposes a two-stage exercise – first the Tribunal must determine whether the claim had no reasonable prospect of success/if the party has acted vexatiously or unreasonably such as to invoke the jurisdiction to make an order for costs. If that stage is satisfied, the second stage is engaged – the Tribunal is required to consider making a costs order but has a discretion whether or not to do so. (Oni v Unison UKEAT/0370/14/LA).
8. The Court of Appeal in Scott v Russell 2013 EWCA Civ 1432, cited the definition of ‘vexatious’ given by Lord Bingham in Attorney General v Barker 2000 1 FLR 759, QBD (DivCt):

‘the hallmark of a vexatious proceeding is... that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceedings 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.’

9. In determining whether conduct was unreasonable, a Tribunal should take into account the ‘nature, gravity and effect’ of a party’s unreasonable conduct (McPherson v BNP Paribas (London Branch) 2004 ICR 1398, CA). This does not mean that the circumstances of a case have to be separated into sections such as ‘nature’, ‘gravity’ and ‘effect’, with each section being analysed separately (Yerrakalva v Barnsley Metropolitan Borough Council and anor 2012 ICR 420, CA). The Court of Appeal in Yerrakalva commented that it was important not to lose sight of the totality of the circumstances. The vital point in exercising the discretion to order costs is to look at the whole picture. The Tribunal has to ask whether there has been unreasonable conduct by the paying party in bringing, defending or conducting the case and, in doing so, identify the conduct, what was unreasonable about it, and what effect it had.
10. 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).
11. 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).
12. Vaughan v Lewisham Borough Council 2013 IRLR 713 is authority that it was not wrong in principle for a Tribunal to make a costs order against an employee even though no deposit order had been made or costs warning given, or to make an award which the paying party could not in their present financial circumstances afford to pay where the Tribunal considered that it might be able to pay in due course.
13. The Tribunal had previously found the claimant’s conduct of the claim to have been unreasonable and it was struck out for that reason. The burden of proof was upon the claimant and he took no steps to explain the claim he advanced. Instead, he pursued unmeritorious reconsideration

applications. The Tribunal therefore finds that the stage, that the claim had no reasonable prospect of success and the claimant acted unreasonably.

14. The Tribunal then considered whether to exercise its discretion to make a costs award against the claimant. It considered the claimant's conduct was unreasonable and vexatious (in that it was designed to harass and inconvenience the respondent) and so engaged the cost Rules. The Tribunal finds that the claimant knew that he had not complied with the Tribunal's Orders and that therefore, the respondent could not effectively respond to his claim for holiday pay. That was unreasonable conduct and it caused inconvenience to the respondent as it had to attempt to defend the proceedings.
15. The Tribunal considered the claimant's ability to pay any costs in accordance with Rule 84. The claimant provided a financial breakdown showing his total income as £2,710.00 and his outgoings as £2,674.71. That was the extent of the information provided.
16. The respondent referred to Employment Judge Clarke's findings at the preliminary hearing on 14/1/2022. She recorded that she would have made a deposit order of £250, based upon the fact that the claimant had disposable income of £19.43 per month, or £73.93 if his Sky TV subscription was discounted. She also noted he had £5,000 in savings for contingencies. Those savings were not referred to by the claimant. It is assumed he still has them.
17. Although they are not required to, the respondent did not include in its bundle any costs warnings.
18. Irrespective of this lack of information, the Tribunal considered the cost Rules were engaged, decided to exercise its discretion to make a costs award and in light of the limited information available (despite the claimant being given the opportunity to provide evidence). The sum awarded to be paid to the respondent is £1,000, plus vat. This represents approximately 25% of the claimant's savings and just over 14% of the respondent's net costs sought.

Employment Judge Wright

Date 23 January 2023