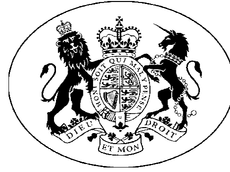

EMPLOYMENT TRIBUNALS

Claimant: Ms S Messi

Respondent: Precise Media Monitoring Limited (T/A Onclusive)

JUDGMENT

No order for costs is made on the respondent's application for costs dated 21 March 2023.

REASONS

Facts

1. The respondent has applied for an order for costs following the dismissal of the claimant's application for interim relief by judgment sent to the parties on 7 March 2023 ("the interim relief judgment"). This judgment is to be read in conjunction with the judgment and reasons of the interim relief judgment, which sets out the facts as found by the tribunal on that application.

2. As set out in the written reasons of the interim relief judgment, the claimant presented two ET1s, the second of which, on 20 January 2023, contained an application for interim relief relating to her complaint of automatically unfair dismissal.

3. On 14 February 2023 the respondent's solicitors sent the claimant a letter headed "Without prejudice save as to costs". In it they set out the purpose of their letter, which was to confirm their view that the claimant's application for interim relief was highly unlikely to succeed, to put her on notice they considered that she had acted vexatiously, abusively, disruptively and unreasonably in bringing her claims and in conducting proceedings, to invite her to withdraw her claims and her application for interim relief, and to put her on notice that if she pursued her claims and application and was unsuccessful that the respondent would apply for costs. The respondent's solicitors noted that both claims were brought before the claimant was dismissed, and that the tribunal did not have jurisdiction to hear any claims relating to dismissal. They pointed out that the reasons for dismissal had been clearly communicated to her by letter. They also pointed out their understanding that the claimant has had up to 14 employment tribunal judgments issued against her, including in respect of a failed application for interim relief. They observed that the tribunal had made costs orders against her

in the past. They noted the fact that this tribunal had written to the claimant about the volume of correspondence the claimant had sent to the tribunal. They observed that the claimant had persistently and habitually issued claims without reasonable grounds which was an abuse of tribunal process. In all the circumstances, they considered that the claimant had acted vexatiously, abusively, disruptively and unreasonably in bringing her claims which did not have any reasonable prospects of success. They considered that the application for interim relief was bound to fail, and they invited her to withdraw her application for interim relief and both claims by 15 February 2023. They indicated that if she failed to do so and she was ultimately unsuccessful they would seek an award of costs against her.

4. I heard the claimant's application for interim relief on 21 February 2023, and dismissed it for reasons given in the interim relief judgment.

5. By letter dated 21 March 2023, the respondent made an application for costs, enclosing, in support of the application, the interim relief judgment and costs warning letter of 14 February 2023. The grounds for the application was set out in the letter, but in brief:

    a. The respondent had to defend a poorly conceived application which the claimant knew would likely fail;

    b. Paragraph 48 of the interim relief judgment detailed that the claimant's employment was ongoing at the point she made her application for interim relief;

    c. Paragraph 51 of the interim relief judgment set out that there was little to any public interest in the complaints made by the claimant;

    d. Paragraph 58 of the interim relief judgment set out that a tribunal would be unlikely to find that the reason for dismissal was for having made protected disclosures;

    e. The tribunal had refused to reconsider the judgment on the basis that there was no reasonable prospect of the original decisions being varied or revoked

    f. The claimant was an experienced litigator who pursued the application for interim relief unreasonably knowing that it had no reasonable prospects of success;

    g. The claimant had been issued with a costs warning;

    h. The level of correspondence emanating from the claimant indicated an intention to create disruption via a disproportionate level of inconvenience, harassment and expense.

6. In their letter of 21 March 2023, the respondent's solicitors requested that the application for costs be dealt with in writing.

7. The claimant emailed the tribunal on 21 March 2023 with a response to the costs application. She wrote:

    > *"application for an order for costs shouldn't be granted because before litigation, I raised concerns informally first to HR and also acas to mitigate costs and stress to go to the ET. Despite evidence I sent to demonstrate that I was unfairly dismissed, discriminated against because of my race and disability, harassed and victimised, the respondents did not choose to*

mitigate their loss despite evidence I sent that I was racially discriminated and choose instead to collude and cover up wrongdoing and misconduct in which both respondents and their representatives participated in therefore I am objecting for their applications of costs and any event I won't be able to pay due to them causing me financial hardship".

The law

8. Rule 75 ET Rules provides:

   (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;

9. The power to make a costs order is in Rule 76 which 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;

   (b) any claim or response had no reasonable prospect of success;

10. Rule 84 ET Rules provides:

    "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. Costs orders are the exception rather than the rule in employment tribunal proceedings, but that does not mean that the facts of the case must be exceptional (*Power v Panasonic (UK) Ltd* UKEAT/0439/04).

12. Such awards can be made against unrepresented litigants, including where there is no deposit order in place or costs warning (*Vaughan v London Borough of Lewisham* UKEAT/0533/120). However, a litigant in person should not be judged against the same standards as professional representative (*AQ Ltd v Holden* [2012] IRLR 648).

13. In terms of abusive, disruptive or unreasonable conduct, "unreasonableness" bears its ordinary meaning and should not be taken to be equivalent of "vexatious" (*National Oilwell Varco UK Ltd v Van de Ruit* UKEAT/0006/14).

14. Guidance has been given by the Court of Appeal in *Barnsley Metropolitan Borough Council v Yerrakalva* [2012] IRLR 78 on the approach to assessing unreasonable conduct:

    > *"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".*

15. The tribunal does not need to identify a direct causal link between the unreasonable conduct and the costs claimed (*MacPherson v BNP Paribas (London Branch*) (No 1) [2004] ICR 1398).

Conclusions

16. As set out in the interim relief judgment, section 129 ERA refers to whether it appears to the tribunal that "it is likely" that a tribunal will in due course find that the dismissal was automatically unfair because the claimant made a protected disclosure. The case law establishes that this must be to a reasonably high degree of likelihood.

17. I have no doubt that any competent legal representative would have advised the claimant against bringing an application for interim relief. I do not judge the claimant against the standard of a professional representative, however. A litigant in person can often lack objectivity about their own case, can become highly emotionally invested in it and can become highly suspicious about what their former or employer or legal representatives may say about the strength of their case.

18. From the documents I saw during the interim relief application, my impression was that the claimant is very invested in her claims. She probably lacks objectivity about them, and her pursuing her application for interim relief in spite of the respondent's solicitors' reasonable observations about the strengths of her application is understandable.

19. There is considerable force in the respondent's solicitors' suggestion that as an experienced litigator the claimant should have known that she was pursuing a hopeless application. But as I have observed, she is very invested in these claims and probably lacks objectivity about them. I suspect that her previous experience counts for little in how she views her present claims.

20. This probably comes as cold comfort to the respondent, but I would have (subject to means, about which I know practically nothing) in all likelihood made an award of costs against the claimant had she been represented. However, I do not consider that in this instance the claimant's conduct passes the threshold of unreasonableness for me to consider whether to exercise my discretion to make an award of costs.

21. I understand this matter is proceeding to a preliminary hearing in June. I would urge the claimant, if she is able, to seek expert advice about these claims.

Employment Judge **Heath**

8 April 2023

JUDGMENT & REASONS SENT TO THE PARTIES ON

11/04/2023

FOR THE TRIBUNAL OFFICE