EMPLOYMENT TRIBUNALS

Claimant: Ms Agata Rybak

Respondent: Wade Macdonald Ltd

JUDGMENT ON COSTS

The respondent's application that the claimant pay its costs under Rule 76(1) is refused.

REASONS

Introduction

1. At full liability Hearing before me on 31 March 2022 the claimant's claim for unlawful deductions was found to be not well founded and was dismissed. The claimant's claim for breach of contract was also found not to be well founded and was dismissed. Finally, the Tribunal determined that it did not have jurisdiction to hear a claim in relation to employer's National Insurance Contributions and that claim was also dismissed. Judgement with reasons was given orally at the hearing.

2. After the judgment was sent to the parties on 3 April 2023, the respondent applied for an order for payment of its costs under Rule 76(1) in writing in a letter dated 18 April 2023.

Costs application

3. In its application, the respondent relied on that fact that the claimant's claim was not well-founded and/or that the claimant acted vexatiously, abusively, disruptively or otherwise unreasonably in bringing the proceedings.

4. The respondent said it had made its position clear in the Response to the claim, and also it in 'without prejudice save as to costs letters' on 4 November 2022 (where it made an offer of £500 in full and final settlement but without admission of liability) and its letter dated 20 February 2023, (where it made an offer of £1088.47) . In the first letter it warned the claimant that it may seek payment of its legal costs.

5. The respondent submitted that the claimant acted unreasonably by saying she would accept this offer, as being what she was owed, but then sought further compensation of £1,500 for herself and £500 to a charity. This meant that a hearing was inevitable.

6. The respondent asked for its application to be considered in writing. I asked for the application to sent to the claimant and received her comments dated 24 May 2023 which I have considered as part of this application.

7. The claimant responded briefly to say that she had genuinely believed in her case and had been shocked by the judgment.

8. The claimant did not ask for the application to be heard in person, and therefore I have today considered it in writing. I believe I have sufficient information before me to make a determination here.

9. The parties are reminded that costs are awarded by Employment Tribunals only rarely, as the starting point is that this is a costs-free jurisdiction. and such orders will be made against an unsuccessful party only in the limited circumstances prescribed by Rule 76(1):

> (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
> (c) a hearing has been postponed or adjourned on the application of a party made less than 7 days before the date on which the relevant hearing begins.

10. In this case it is not clear if the respondent relies on Rule 76(1)(a) and (b) or just (a). I will consider both before exercising my discretion one way or another.

11. Following *Solomon v University of Hertfordshire UKEAT/0258/181*, it is not for me to substitute my own view for the claimant's decision to bring and proceed with his claim, but rather to review that decision and consider whether it was 'vexatious, abusive, disruptive or otherwise unreasonable' such as to engage Rule 76(1)(a) in making a costs order. It is also important to look at the whole picture in weighing the discretion to order costs, to identify any unreasonable conduct and what effect it had – *Barnsley MBC v Yerrakalva [2012] IRLR 78.*

12. In the main, the respondent's argument is that the claimant turned down an offer that comprised the complete money value of the claim she was bringing. Not only that, she then asked for more money than she could have claimed if she had been successful.

13. I remind myself here that the offers made by the respondent were expressed to be 'without admission of liability'. I find that the claimant was entitled to pursue a claim in order to receive a judgment that unlawful deductions had been made and it would not have been unreasonable for her to turn down an offer of full compensation where the respondent was not willing to accept that it had made unlawful deductions. If the respondent had been willing to also accept liability, my view might have been different here.

14. Whilst I note the claimant also asked for more money that she had initially said she was claiming, I remind myself that she is a litigant in person without the benefit of legal advice. If she had been professionally represented, my view here might have been different.

15. On balance, I did not feel there was sufficient evidence of the proceedings being conducted in an unreasonable manner.

16. Whilst the claimant's claims were all dismissed, this does not automatically mean that the claim had no reasonable prospect of success. The Tribunal must first consider whether that was the case when the claim began, and then consider whether the claimant knew (or ought reasonably to have known) that this was the case. Having heard the hearing myself, I had the benefit of evaluating the claimant's explanations for bringing and pursuing her claim, and was satisfied that her belief in its merits was genuine even though mistaken. I saw nothing in the information before me which supported the argument that the claimant had acted vexatiously, abusively or disruptively. The essence of the concern here was about the reasonableness of the claimant's conduct, coupled with the reasonableness of the claim's prospects of success.

17. I remind myself that I stated the following in my oral judgment:

> *"I think that at some points during their relationship the parties were speaking at cross purposes. The claimant – if it was that important to her – should have made it clear that she wanted a total package that was going to cost the respondent £25 per hour to provide. If she had been clear, I think they would have let her know that they simply couldn't guaranteed this because there are some many variables. Likewise, the respondent might want to consider making it clear in a similar situation that any breakdown is indicative only and that the agreement will contain an hourly rate subject to deductions. This claim and the entire effort taken by both parties might have been avoided."*

18. I have also considered the fact that the respondent's solicitors warned the claimant in writing, that they may seek payment of their costs. Such

warnings are not uncommon, though they can be overused. A claimant without access to legal advice cannot necessarily be expected to know whether that warning is fair, or a litigation tactic. I am unable to conclude that the claimant ought to have known that her claim had no reasonable prospect of success. Access to legal advice is not realistically available to unrepresented claimants, not least for reasons of cost.

19. For all these reasons, I refuse the respondent's application.

Employment Judge Boyle

Employment Judge Boyle

Date 3 July 2023

JUDGMENT SENT TO THE PARTIES ON

6 July 2023

GDJ
FOR THE TRIBUNAL OFFICE