



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms C

**Respondent:** R Ltd

**Heard at:** London South Employment Tribunal (in person)

**On:** 18 July 2023 (in chambers to consider the parties' written submissions)

**Before:** Employment Judge Abbott, Ms L Gledhill and Ms E Thompson

## Representation

Claimant: Mr A Shepherd, lay representative

Respondent: Mr N Bidnell-Edwards, barrister, instructed by direct access

# JUDGMENT ON COSTS

The unanimous judgment of the Tribunal is that the Respondent's application for orders against the Claimant under Rule 76 and/or Mr Shepherd under Rule 80 be refused.

# REASONS

1. By its Judgment sent to the parties on 5 June 2023 (subsequently confirmed, with some variation to the Reasons, on reconsideration) the Tribunal found in favour of the Respondent in respect of all of the Claimant's complaints.
2. The Respondent applied for a costs order against the Claimant under Rule 76 and/or a wasted costs order against her representative, Mr Shepherd, under Rule 80. It contends that the Claimant (or Mr Shepherd, as appropriate):
  - a. Pursued her claim of victimisation without belief in causation;
  - b. Pursued her claim of unfair dismissal based on an unreasonable interpretation; and
  - c. Conducted the proceedings unreasonably in failing to negotiate, or otherwise negotiating unreasonably, including i) not accepting a reasonable offer, or making reasonable counter offers; ii) breaching

the Without Prejudice Rule, and iii) unnecessarily copying in communications to the Tribunal.

3. The Respondent requested that the application be determined on paper and, in its response, the Claimant did not resist that. We are satisfied it is appropriate to determine the application on paper, and have done so based on the written submissions of the parties.

#### The law

4. Rule 76(1) provides (insofar as relevant):

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 [...]

5. In other words, there is a three-stage process. First, we must ask ourselves whether the conduct falls within rule 76(1); if so, we must go on to determine whether it is appropriate to exercise our discretion in favour of awarding costs against the Claimant; and if so, we must quantify the order.

6. 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”.

(2) “Representative” means a party’s legal or other representative or any employee of such representative, but it does not include a representative who is not acting in pursuit of profit with regard to the proceedings. A person acting on a contingency or conditional fee arrangement is considered to be acting in pursuit of profit.

(3) A wasted costs order may be made in favour of a party whether or not that party is legally represented and may also be made in favour of a representative’s own client. A wasted costs order may not be made against a representative where that representative is representing a party in his or her capacity as an employee of that party.

7. Again, this is essentially a three-stage process. First, has there been conduct within rule 80(1); if so, we must go on to determine whether it is appropriate to exercise our discretion in favour of making a wasted costs order; and if so, we must quantify the order. There is a separate question arising here, being whether Mr Shepherd is a “representative” as defined in Rule 80(2).

Discussion

*Stage 1: Conduct engaging Rule 76(1) and/or Rule 80(1)?*

8. We deal with each of the Respondent's points in turn.
9. First, whether the Claimant pursued the victimisation claim without belief in causation. The victimisation claim failed because we found on the facts that there was no causal link between the alleged detriments and the alleged protected acts. The alleged detriments relied upon for the victimisation claim were (1) the Claimant being furloughed, (2) Miss Z being persuaded to make a false allegation against the Claimant, and (3) the Claimant's dismissal.
10. It is quite right to say that the first two points were barely pursued at the Final Hearing. The evidence of Mr G, Miss I and Mr J that furlough was a decision made based on business need was essentially unchallenged in cross-examination, and it was not put to any of the Respondent's witnesses that Miss Z had been persuaded to make a false allegation. As regards the third point, it was Ms C's evidence that there was some link between the events at the Xmas party / her reports to Miss I and Mr G on 2 December 2019 and her dismissal. We did not accept that evidence but it was not, in our judgement, an unreasonable belief on the part of Ms C.
11. Overall, we do not consider that the victimisation claim had no reasonable prospects of success, nor do we consider it was (in respect of the dismissal) unreasonably pursued. The Claimant, however, ought to have realised that the allegations in respect of furlough and Miss Z were without support, had she gone about matters sensibly.
12. Second, whether the Claimant pursued the unfair dismissal claim based on an unreasonable interpretation. The Respondent points to our finding in paragraph 53 of the Judgment that the Claimant "cannot have failed to appreciate" that Mr G and Miss Y's relationship was a topic of the meeting she attended with Miss D. The Respondent says that this demonstrates the Claimant therefore either knowingly pursued a case on a false basis, or otherwise acted unreasonably in wilfully misunderstanding the allegations against her.
13. It is fair to say that the Claimant's evidence around the dismissal was somewhat confusing. We do agree that it was not reasonable for the Claimant to seek to portray that Mr G and Miss Y's relationship was not a topic of the meeting she attended with Miss D (as is reflected in our findings in the Judgment). It was also not reasonable to maintain that she did not understand the allegations against her, which were clearly set out. However, the real core of the unfair dismissal claim was the question of whether the Respondent could fairly conclude that Claimant did breach confidentiality in a conversation with Miss Z. The Claimant's consistent position was that she did not breach confidentiality. If better advised, the Claimant may have appreciated that the hurdle was a high one to succeed, because she would have to show that no reasonable employer could have concluded that she did breach confidentiality. However, we do not think the claim had no reasonable prospects of success. We do though accept that, in the ways identified above, some arguments

forming part of the claim were unreasonable pursued.

14. Third, not accepting reasonable offers or making reasonable counter-offers. It is submitted that, when considering these offers, the Claimant did not meaningfully engage, and did not ever adequately factor in the difficulties in respect of prospects for all of her claims. However, it is evident from the correspondence that the Respondent was not either genuinely entertaining the prospect of the Claimant succeeding in any of her allegations, and the offers were pitched at a level that reflected no more than the costs the Respondent would have to incur to defend the claims. We do not regard the Claimant (or her representative's) conduct in these negotiations as meeting the requirements of Rule 76(1) or 80(1).
15. Fourth, breaching the without prejudice rule. The Respondent has provided evidence that shows the Claimant and her representative submitting without prejudice materials to the Tribunal after being warned not to (and having had the rule explained to them). We accept this was unreasonable in the conduct of the proceedings and both Rule 76(1) and 80(1) are met.
16. Fifth, unnecessarily copying the Tribunal on routine correspondence. In this regard, it is not unusual for parties who are unfamiliar with the Tribunal process to find it difficult to draw the line between when the Tribunal should be copied and when not. We did not see anything that we would class as being unreasonable in this case.
17. In conclusion then at the first stage, the following meet the requirements of Rule 76(1) and/or Rule 80(1):
  - a. Pursuit of the allegations in respect of furlough and Miss Z as part of the victimisation claim (but not the pursuit of the victimisation claim as a whole).
  - b. Pursuit of the assertions that (i) Mr G and Miss Y's relationship was not a topic discussed at the meeting with Miss D and (ii) the Claimant did not understand the allegations being made against her under the unfair dismissal claim (but not the pursuit of the unfair dismissal claim as a whole).
  - c. Breaches of the without prejudice rule by copying such materials to the Tribunal.

*Stage 2: discretion*

18. In deciding whether to exercise our discretion, we acknowledge that the making of costs orders in the Employment Tribunal is an exception rather than the rule (*Yerrakalva v Barnsley Metropolitan Borough Council and anor* [2012] ICR 420, CA). As set out by Mummery LJ in his judgment in *Yerrakalva*, 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.
19. We have identified the unreasonable conduct under stage 1. We next consider

the effects.

20. In respect of the pursuit of the allegations in respect of furlough and Miss Z as part of the victimisation claim, the Respondent says that, had these points not been pursued, it would not have been required to call evidence in respect of furlough, or to cross-examine more broadly in respect of the victimisation complaints. However, in our judgement, this did not materially affect the conduct of the case. There was very little evidence on furlough. It is possible that the cross-examination of the claimant could have been shorter, but it is unlikely that a great deal of Tribunal time could have been saved.
21. In respect of the pursuit of the assertions that Mr G and Miss Y's relationship was not a topic discussed at the meeting with Miss D and that the Claimant did not understand the allegations being made against her under the unfair dismissal claim, again we accept that this led to the cross-examination of the Claimant being lengthened. However, we do not agree that this likely added two days to the final hearing, as asserted by the Respondent (albeit in the context of saying that the victimisation and unfair dismissal claims were without reasonable prospects in their entirety – a submission we have rejected). Some time may have been saved had the points not been taken (including in counsel's preparation for cross-examination), but in our judgement this was unlikely to be material in the overall context.
22. In respect of the breach of the without prejudice rule, there was no real effect on the final hearing, as the without prejudice material did not come to the attention of the Tribunal panel.
23. Overall, we regard the effects of the Claimant's unreasonable conduct to be very limited. We also consider the following factors to be relevant to the exercise of discretion in this case:
  - a. Mr Shepherd is not legally trained, so a limited degree of leeway should be afforded to him and to the Claimant in respect of understanding of legal principles and processes.
  - b. The nature of the correspondence, including letters sent by the Respondent's representatives, only served to inflame relations rather than encourage co-operation.
  - c. Notwithstanding the limited unreasonable behaviours identified, this was a case where there were considerable factual disputes that needed to be resolved – the behaviours did not impair the ability of the Tribunal to do so fairly and justly.
24. Accordingly, in our judgement weighing the factors identified above, it would not be just to exercise our discretion to make an order under either Rule 76 or Rule 80 in this case. We decline to do so, and therefore refuse the Respondent's application.

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**Employment Judge Abbott**

**Date: 31 July 2023**

JUDGMENT SENT TO THE PARTIES ON

**Date 11 August 2023**

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FOR THE TRIBUNAL OFFICE