Case No: 2207555/2021

EMPLOYMENT TRIBUNALS

Claimant: **Ms G. Kekati**
Respondents: **(1) Skinfluencer Ltd**
(2) Mr. D. Pires
(3) Dr U. Desai
(4) Ms S. Shafer

London Central **2 February 2024**
Employment Judge Goodman

COSTS JUDGMENT

The claimant is ordered to pay the respondents £1,750 in costs.

REASONS

1. The four respondents applied on 16 August 2024 for an order that the claimant pay their costs. All the claims against them for detriment and dismissal for making protected disclosures, and all the money claims, were dismissed by a reserved Judgment sent to the parties on 19 July 2023.

Relevant Law

2. The relevant rules are set out in the Employment Tribunal Rules of Procedure 2013. By rule76:

> (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.
>
> (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.

3. Even if the tribunal decides one of the thresholds has been crossed, it must exercise discretion in deciding to make an order. By rule 84,

> 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.

4. Rule 78 provides that a tribunal can either make a summary assessment of costs up to £20,000, or order a detailed assessment of the receiving party's bill applying CPR principles.

5. Looking at the rule 76 thresholds in more detail, what is *unreasonable* will usually include having no reasonable prospect of success, or behaving in other ways that are unreasonable. A litigant in person should not always be expected to understand matters with the objectivity and knowledge of a professional representative, but litigants in person can still behave unreasonably – **AQ v Holden (2012) IRLR 648.**

6. The amount of any award should be related to the "nature gravity and effect" of the conduct, though it is not necessary to relate specific costs to specific acts – **McPherson v BNP Paribas (2004) EWCA Civ 569; Barnsley MBC v Yerrakalva (2011) EWCA Civ 1255.**

The Application

7. The respondent submits that the claimant's conduct has been unreasonable because:

(1) their attempts to settle the claim had been rejected. As the final hearing in July 2022 approached, they offered £10,000 on 12 May 2022. They had warned the claimant their costs stood at £12,000 then. In April 2023 they reminded her had increased to £18,900. The current claim following the hearing is £33,725.14.

(2) despite being ordered by Judge Khan in July 2022 only to add documents and witness evidence about the IT difficulty alleged as responsible for her inability to participate in an online hearing in July 2022, she had (1) added large numbers of documents – some of them already in the respondent's bundle, and some of them relevant to the claim but previously undisclosed, and (2) just before the relisted final hearing in April 2023 sent a revised witness statement with substantial material unrelated to the limited issue of postponement, instead adding to her existing evidence, and in response to the respondent's witness statements. She also claimed material had been deleted from the bundle when it had not.

(3) her witness statement was not cross referenced to the bundle as ordered by Judge Khan on 7 March 2023. This was unreasonable and disruptive.

(4) the claim that she had been subjected to cyber-attack and that a witness had accessed her i-pad just before the July hearing such that she could not access the documents bundle – on which basis she had sought a postponement – was unsubstantiated and outrageous.

(5) it was disruptive to say she was unrepresented, then that her representative was too ill to attend, then that she would be acting. (I note here Ms Caller's statement of 18 July 2022 when the final hearing was postponed after two days that she was ill with a fever but had assisted Ms Kekati to find the bundles and change her password). They suggest she obtained a postponement after two days on spurious grounds.

8. The claimant has not responded to the costs application, although invited to do so on 21 August 2023. On 29 August she asked for a transcription of the hearing and was advised by HMCTS that hearings were not recorded. She has not been prompted to respond by the respondent sending their costs breakdown either. Their correspondence has been sent both to the claimant herself and to her solicitor, Lilian Caller.

9. The claimant did seek reconsideration of the judgment, on the grounds that various documents had not been put in evidence, but reconsideration was refused in an order sent on 3 August 2023, largely because the documents were all ones which could have been included in the hearing bundle but were not.

Discussion and Conclusion

10. I do not find that failing to accept an offer in May 2022 was of itself unreasonable. The schedule of loss claims around £45,000 in financial loss under various heads. The claim for commission is ambitious given the lack of any evidence of the agreement claimed. There is also an ambitious claim for £45,600 injury to feelings, but it is difficult for unrepresented parties to understand the level of awards, and at the time, it seems, she had parted or was about to part company with her then solicitor. If she had appreciated the difficulty of her claims it would have been sensible to accept, but otherwise it was an offer made to save the respondent costs, rather than a compromise on merits and value.

11. As for the postponement of the July 2022 hearing, there must be some suspicion that the claimant had manufactured her IT difficulty to avoid a hearing, and that may be why Judge Khan ordered evidence to be produced about the difficulty. At the final hearing we concluded the claimant had little knowledge of IT, so her lack of comprehension of how to reset her password to gain access to documents in July 2022 may have been real rather than an excuse or a faked allegation of hacking. But in ordering a postponement under rule 30A, Judge Khan also recorded:

> There had been a collective failure to comply with the tribunal's orders in relation to the provision of the hearing bundle, exchange of witness statements, and the draft list of issues was inadequate, and the claimant had been left without legal representation the night before the hearing.

12. This expresses his view was that the respondents were also at fault. I too hold the respondents bear some responsibility for the state of the hearing bundle at the final hearing in April 2023– here I refer to paragraph 7 of the

August 2023 judgment about the difficulties of using the electronic bundle, and to the different pagination of the paper copies others (including the respondent's representatives) were using, failing to supply hard copy bundles (so one of non-legal members had to return home in order to access the electronic bundle) and not providing their own witness statements until part way through the first day, or not providing Danilo Pires with witness statements or a hearing bundle when calling him.

13. There is no doubt that the claimant's failure to comply with Judge Khan's order was disruptive, notably in failing to cross reference her statement to documents. His orders were made in order to ensure a smooth hearing, and instead significant time was taken up hearing the respondent's application to strike out, and then removing new material from evidence, when the statement supplied in July 2022 was supposed to have been the final version. The claimant's conduct of the claim since May 2022 or so, when represented and when unrepresented, has been disorganised. At times the tribunal wondered if she had read the bundle at all. The respondent's exasperation is understandable.

14. The level of disorganisation of documents, given the respondents are not entirely blameless, is not enough to make a costs order.

15. Her attitude to the witness statement is very difficult to understand. Judge Khan noted in July 2022 that the statements exchanged pursuant to an earlier case management direction had not been cross referenced to the bundle as directed. By March 2023 the position was no better and he made specific orders than that there should be a revised agreed bundle, including some additional documents the claimant wanted to rely on, and that the claimants statement should be cross referenced to the new bundle, and a track-changed version of the statement provided to show where amendments had occurred, in order to get the case into shape for the final hearing. It was also clear that she had only been given permission to file supplemental statements about the allegation that her i-Pad had been hacked in July 2022. Instead, she filed a new and very long witness statement, not cross referenced to documents, rewriting the earlier material and including many matters not mentioned in her earlier statement, so the supplements to her witness statement were not limited to the hacking issue on which additional evidence had been permitted. As it was filed at such a late stage, it was no wonder that it caused the respondent grief. I conclude that to do this in the face of Judge Khan's explicit order, and at a time when she was legally represented, and so must have had some advice or explanation of what was expected, (even if, as is possible, she prepared the statement herself), was unreasonable. Sometimes litigants in person serve statements late, and a tribunal and the other side's representatives, will do their best, but this was done contrary to an explicit order. There has been no explanation here why she did this. I conclude there should be some order for costs for the extra work this caused.

16. It is not easy to assess how this increased the costs. Two representatives appeared for the respondents, Mr Oswin for the first respondent, Ms Beckles

for the other three. Mr Oswin did not appear to have a detailed command of the bundle contents when questioning the claimant. Final submissions were made by Ms Beckles. On the schedule of costs, Mr Oswin (a legal executive charged at £150 per hour, the time spent is not stated on the schedule) claims £190, £650, £360, and £585 for dealing with bundles between 17 and 19 April, and £2,114 for the witness statements. Some of Mr Oswin's time must have been spent because he was new to the case, not because the claimant had failed to cross reference her documents or added material. Ms. Beckles, an HR consultant charged at £76.50 per hour, has charged £1,810 for the bundle on 24-29 March, before Mr Oswin was instructed on 13 April, then £344 and £726, for witness statement and bundles over 18- 20 April.

17. Mr Oswin has also charged £450 for the application to strike out, and the application added half a day to the hearing time. Making that application in a protected disclosure case which was prepared and ready to go ahead would always have been difficult and while it may have been prompted by the claimant's failure to heed the March order, it is not something the claimant should be ordered to pay.

18. For the rest, I have concluded that the claimant should be ordered to pay costs in the sum of £1,750 for the added time incurred by the respondents because of the amended witness statement and muddled approach to documents. That represents an extra half day in tribunal and some of the pre-hearing preparation. It allows £500 for Ms Beckles and £1,250 for Mr Oswin.

19. The claimant has not supplied information on her ability to pay. She works as an aesthetician and so has some earning capacity.

20. Finally, I regret the time taken to decide the respondent's application. Heavy sitting commitments and an accumulation of annual leave have prevented earlier attention to the application.

Employment Judge Goodman
2 February 2024

COSTS JUDGMENT AND REASONS
SENT to the PARTIES ON

7 February 2024

.....

.....
FOR THE TRIBUNAL OFFICE