EMPLOYMENT TRIBUNALS

Claimant: Mr H Amin

Respondent: Wurth UK Limited

Heard at: London South (Croydon) via CVP **On:** 26/1/2023

Before: Employment Judge Wright

Representation:
Claimant: In person
Respondent: Ms G Reziae - counsel

JUDGMENT

The respondent's application for costs was successful. The claimant is ordered to pay to the respondent the sum of **£1,500 + VAT** (if the respondent is unable to recover the VAT paid).

REASONS

1. The first part of the hearing determined the respondent's strike out application which was successful. The claim was struck out as the claimant had failed to actively pursue it; was in breach of all of the Tribunal's Orders; and as a result, had conducted the claim unreasonably.

2. In making its costs application, the respondent relied upon the successful strike out application and the claimant's unreasonable conduct.

3. The respondent sought its costs totalling £3,075.50 plus vat. A break-down of the costs sought was provided and they related to the period 1/11/2023 to 12/1/2024.

4. The claimant was asked about his ability to pay – his means: income; outgoings; assets; and debts/liabilities.

5. His responses were unsatisfactory. When the claimant had applied for the hearing to be postponed in order to take legal advice; he said that he had just returned to the UK and he intended to sell his car to raise funds. He said he was trying to find work and would therefore need another means of commuting to work, should he find another job. When asked about the proposal of selling his car, the claimant said that it had been in the garage for 7 months, did not have an MOT certificate or insurance. He said it was worth £3,000 to £4,000. He said that he did not have any income and had a loans of 'a few grand'. He also said that did not have paid work, but that he was 'helping out' a start up company. It does not make sense that if the claimant had no income and was reduced to loans from relatives, that he would work for a start up company for no income.

The Law

6. The material provisions of the ET Rules 2013 governing costs applications are excerpted below:

> Rule 74. Definitions
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> (1) "Costs" means fees, charges, disbursements or expenses incurred by or on behalf of the receiving party (including expenses that witnesses incur for the purpose of, or in connection with, attendance at a Tribunal hearing). […]
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> Rule 75. Costs orders and preparation time orders
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> (1) A costs order is an order that a party ("the paying party") make a payment to—
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> (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.
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> Rule 76. Where a costs order or preparation time order may or shall be made
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> (1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—
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> (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
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> (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.

Rule 77. Procedure

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.

Rule 78. The amount of a costs order

(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;

(b) order the paying party to pay the receiving party the whole or a specified part of the costs of the receiving party, with the amount to be paid being determined, in England and Wales, by way of detailed assessment carried out either by a county court in accordance with the Civil Procedure Rules 1998, or by an Employment Judge applying the same principles; […]

(3) For the avoidance of doubt, the amount of a costs order under sub-paragraphs (b) to (e) of paragraph (1) may exceed £20,000.

Rule 84. Ability to pay

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.

7. When determining an application for costs, the ET should apply a three-stage approach:
    a. Is the relevant jurisdictional threshold in rule 76 met?
    b. If so, should the ET exercise its discretion in favour of making a costs order?
    c. If so, what sum of costs should the ET order?

8. For the purposes of rule 76(1)(a) the word "unreasonable" is to be given its ordinary English meaning and is not to be interpreted as meaning something similar to vexatious (Dyer v Secretary of State for Employment UKEAT/0183/83).

9. The Tribunal should consider the nature, gravity and effect of the unreasonable etc conduct, but it is appropriate to avoid a formulaic approach and have regard to the totality of the relevant conduct. As Mummery LJ explained in Yerrakalva v Barnsley MBC [2012] ICR 420, CA at §41:

> 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 […]

10. It should, however, be noted that the Tribunal is not confined to making an award limited to those costs caused by the unreasonable conduct. As Mummery LJ confirmed in McPherson v BNP Paribas (London Branch) [2004] ICR 1398, CA:

> 39. Miss McCafferty submitted that her client's liability for the costs was limited, as a matter of the construction of rule 14, by a requirement that the costs in issue were "attributable to" specific instances of unreasonable conduct by him. She argued that the tribunal had misconstrued the rule and wrongly ordered payment of all the costs, irrespective of whether they were "attributable to" the unreasonable conduct in question or not. The costs awarded should be caused by, or at least be proportionate to, the particular conduct which has been identified as unreasonable.
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> 40. In my judgment, rule 14(1) does not impose any such causal requirement in the exercise of the discretion. The principle of relevance means that the tribunal must have regard to the nature, gravity and effect of the unreasonable conduct as factors relevant to the exercise of the discretion, but that is not the same as requiring BNP Paribas to prove that specific unreasonable conduct by the applicant caused particular costs to be incurred. As Mr Tatton-Brown pointed out, there is a significant contrast between the language of rule 14(1), which deals with costs generally, and the language of rule 14(4), which deals with an order in respect of the costs incurred "as a result of the postponement or adjournment". Further, the passages in the cases relied on by Miss McCafferty (Kovacs v Queen Mary and Westfield College [2002] ICR 919, para 35, Lodwick v Southwark London Borough Council [2004] ICR 884, paras 23-27, and Health Development Agency v Parish [2004] IRLR 550, paras 26-27) are not authority for the proposition that rule 14(1) limits the tribunal's discretion to those costs that are caused by or attributable to the unreasonable conduct of the applicant.
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> 41. In a related submission Miss McCafferty argued that the discretion could not be properly exercised to punish the applicant for unreasonable conduct. That is undoubtedly correct, if it means that the indemnity principle must apply to the award of costs. It is not, however, punitive and impermissible for a tribunal to order costs without confining them to the

> costs attributable to the unreasonable conduct. As I have explained, the unreasonable conduct is a precondition of the existence of the power to order costs and it is also a relevant factor to be taken into account in deciding whether to make an order for costs and the form of the order.

11. Mummery LJ did not resile from these observations in his later judgment in Yerrakalva, though he did emphasise in Yerrakalva that whilst the Tribunal is not limited to awarding those costs incurred by the receiving party as a result of the paying party's unreasonable conduct, the "effect" of the unreasonable conduct will often be a relevant factor in the Tribunal's exercise of its discretion.

12. In circumstances where the Tribunal finds that the jurisdictional threshold in rule 76 is met, the Tribunal retains a broad discretion as to whether to make a costs order and the amount of any costs awarded. Whilst there is no closed list of factors relevant to the exercise of the Tribunal's discretion, the following factors are often relevant:
    d. Costs orders are intended to be compensatory, not punitive (Lodwick v Southwark LBC [2004] ICR 884, CA). Therefore, the extent of any causal link between the unreasonable etc conduct and the costs incurred will normally be a relevant discretionary factor (Yerrakalva), albeit there is no requirement to establish a causal link between the unreasonable conduct and the costs incurred before an order can be made (McPherson).
    e. The paying party's ability to pay is a factor which the Tribunal is entitled, but not obligated, to consider (see rule 84). Where regard is had to the paying party's ability to pay, that factor should be balanced against the need to compensate the receiving party who has unreasonably been put to expense (Howman v Queen Elizabeth Hospital Kings Lynn UKEAT/0509/12).
    f. Any assessment or consideration of means need not be limited to the paying party's means as at the date the order is made. It is sufficient that there is a "realistic prospect that [they] might at some point in the future be able to afford to pay" (Vaughan v London Borough of Lewisham [2013] IRLR 713, EAT).
    g. Where the Tribunal does decide to take the paying party's means into account, it must do so on the basis of sufficient evidence (for example by the paying party completing a county court form EX140) (Oni v NHS Leicester City UKEAT/0144/12).
    h. There is no requirement to limit costs to the amount the paying party can afford (Arrowsmith v Nottingham Trent University [2012] ICR 159, EAT).
    i. The Tribunal may have regard to the means of a party's spouse or other immediate family members (Abaya v Leeds Teaching Hospitals NHS Trust UKEAT/0258/16).
    j. Whether a party is legally represented may be a relevant factor. An

unrepresented litigant may be afforded more latitude than a party who has the benefit of professional legal advice and representation (AQ Ltd v Holden [2012] IRLR 648, EAT).

13. In Radia v Jefferies International Ltd UKEAT/0007/18/JOJ the EAT said:

> '61. It is well-established that the first question for a Tribunal considering a costs application is whether the costs threshold is crossed, in the sense that at least one of Rule 76(1)(a) or (b) is made out. If so, it does not automatically follow that a costs order will be made. Rather, this means that the Tribunal may make a costs order, and shall consider whether to do so. That is the second stage, and it involves the exercise by the Tribunal of a judicial discretion. If it decides in principle to make a costs order, the Tribunal must consider the amount in accordance with Rule 78. Rule 84 provides that, in deciding both whether to make a costs order, and if so, in what amount, the Tribunal may have regard to ability to pay.
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> 62. At the first stage, accordingly, it is sufficient if either Rule 76(1)(a) (through at least one sub-route) or Rule 76(1)(b) is found to be fulfilled. There is an element of potential overlap between (a) and (b). The Tribunal may consider, in a given case, under (a), that a complainant acted unreasonably, in bringing, or continuing the proceedings, because they had no reasonable prospect of success, and that was something which they knew; but it may also conclude that the case crosses the threshold under (b) simply because the claims, in fact, in the Tribunal's view, had no reasonable prospect of success, even though the complainant did not realise it at the time. The test is an objective one, and therefore turns not on whether they thought they had a good case, but whether they actually did.
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> 63. In this regard, the remarks in earlier authorities, about the meaning of "misconceived" in Rule 40(3) in the 2004 Rules of Procedure, are equally applicable to this replacement threshold test in the 2013 Rules. See in particular Vaughan v London Borough of Lewisham [2013] IRLR 713 at paragraphs 8 and 14(6). However, in such a case, what the party actually thought or knew, or could reasonably be expected to have appreciated, about the prospects of success, may, and usually will, be highly relevant at the second stage, of exercise of the discretion.
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> 64. This means that, in practice, where costs are sought both through the Rule 76(1)(a) and the Rule 76(1)(b) route, and the conduct said to be unreasonable under (a) is the bringing, or continuation, of claims which had no reasonable prospect of success, the key issues for overall consideration by the Tribunal will, in either case, likely be the same (though there may be other considerations, of course, in particular at the second stage). Did the complaints, in fact, have no reasonable prospect of success? If so, did the complainant in fact know or appreciate that? If

not, ought they, reasonably, to have known or appreciated that?

Conclusions

14. The threshold in Rule 76 is met. There is no question that his failure to advance or actively pursue his claim was unreasonable conduct by the claimant. There is also his failure to comply with the Tribunal's Orders; that conduct falls within Rule 76(2). There is no element of reasonableness under Rule 76(2).

15. The next question is whether the Tribunal should exercise its discretion to award costs. The Tribunal decided to do so. The claimant attended a preliminary hearing and indicated he wished to make an application to amend his claim. This hearing was listed to hear that application. The claimant did not pursue his application and did not withdraw it. The claimant had the benefit of legal advice. The claimant has shown a complete disregard for the Tribunal process and has misused the procedure.

16. The next question therefore the sum to be awarded. The Tribunal is mindful that a costs award is coupled with the claim having been struck out. The fact that the claim has been struck out however is due to the claimant's own unreasonable behaviour and his complete disregard of the Tribunal's Orders. Had the claimant attempted to comply with the Orders, for example, had he responded to Employment Judge Khalil's Order of 24/7/2023 (in simple terms to provide straight-forward information about his discrimination claim), the claim may not have been struck out, however frustrating that would have been for the respondent.

17. The fact the claimant's evidence in respect of his means was unsatisfactory ***could*** be addressed by exercising the Tribunal's discretion under Rule 84 and deciding not to have regard to the claimant's ability to pay. The costs sought however are modest, in respect to the overall costs which will have been incurred by the respondent and which quite rightly it does not seek to recover under this application.

18. ***If*** the claimant is impecunious, then awarding even a modest sum in respect of costs will impact upon him. The claimant however is not impecunious as he informed the Tribunal he had a car, which he suggested he would sell to fund legal advice.

19. The claimant is therefore Ordered to pay the respondent its costs in the sum of £1,500 + VAT. VAT is only payable if the respondent is unable to recover the sum paid from HMRC.

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Employment Judge V Wright
Date: 26 January 2024

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