EMPLOYMENT TRIBUNALS

Claimant: Ms K Edwins

Respondent: Artem Ltd

Heard at: Watford Employment Tribunal (On papers)

On: **9 February 2024**

Before: Employment Judge Quill; Ms S Boot; Mr P Miller

COSTS JUDGMENT

(1) The Respondent's application for costs is refused.

(2) The Respondent is ordered to pay £2610 to Claimant for costs.

REASONS

Introduction

1. We have previously issued a liability judgment and a remedy judgment. The parties have received written reasons for each.

2. For the reasons that we gave at the remedy hearing, we could not deal with the respective costs applications on the day.

3. The Claimant's costs application is dated 6 September 2023, and supported by bundle of 42 pages, and also an itemised costs schedule.

4. The Respondent's' costs application is dated 6 October 2023, and includes within it the amounts being sought.

5. The parties were in agreement that decisions on both applications should be made without a hearing and based on written submissions only.

The Law

6. In the Employment Tribunals Rules of Procedure, the section "Costs Orders, Preparation Time Orders And Wasted Costs Orders" is Rules 74 to 84.

7. When an application for costs is made, or when the Tribunal is considering the matter of its own initiative, there are potentially the following stages to the decision.

7.1 Has one (or more) of the criteria (for costs to potentially be awarded) as set out in the rules been met.

7.1.1 If not, there can be no order for costs.

7.1.2 If so, which rule or rules contain the criteria which have been satisfied (and why)?

7.2 Is the rule one which requires the Tribunal to consider making an award, or is it one which says the Tribunal "may" consider making an award.

7.3 Either way, if the criteria for a costs order are met, that means that the Tribunal has discretion to make an award, not that it is obliged to. So what are the relevant factors in this case, and, taking into account all of the relevant factors (and ignoring anything which is irrelevant), should an award be made.

7.4 If an award is to be made, what is the amount of the award? (And what is the time for payment, etc).

8. Rule 84 states:

> **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.

9. As per the rule, "ability to pay" is something that "may" be taken into account at each of the last two stages of the decision-making. That is: should an award be made at all; if so, what is the size of the award (and the timetable for payment). A tribunal is not obliged to take "ability to pay" into account, but should specify whether it has done so or not (and, if not, why not). Generally speaking, where a party wants the Tribunal to decide that they do not have the ability to pay, then the onus is on them to (i) raise the point and (ii) provide evidence to back up the argument. That being said, in accordance with the Tribunal's duty of fairness, and in accordance with Rule 2, it may be appropriate for the Tribunal to seek to ensure that a party (especially a litigant in person) understands that the onus is on them (at least, in cases where the order might be a large one): Oni v NHS Leicester City UKEAT/0133/14.

10. Rule 76, insofar as is relevant, states:

> **76.— When a costs order or a preparation time order may or shall be made**
>
> (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
>
> (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.
>
> (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.

11. So one set of criteria for a costs order to be made are those set out in Rule 76(2). The tribunal is not obliged to consider making an award in such circumstances, but it may make an order. These criteria cover breaches of orders or practice direction, and they also cover postponement/adjournment where the application was made more than 7 days before the hearing was due to start.

12. If the criteria set out in Rule 76(1) are met, the Tribunal must actively consider whether or not to make an award (though it is not obliged to decide to make the award). The three subparagraphs are each independent. It is sufficient that any one of (a), or (b) or (c) is met.

13. As was noted in Radia v Jefferies International Ltd [2020] UKEAT 7_18_2102:

> 63. … 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.
>
> 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?

14. So there can be an overlap in the arguments about whether the party acted reasonably in bring the claim (or conducting the pursuit of the claim or response) [Rule 76(1)(a)] and about whether the claim or response had no reasonable prospects of success [Rule 76(1)(b)]. Both sets of arguments can (and should) be considered. See Opalkova v Acquire Care Ltd EA-2020-000345-RN at paragraphs 24 and 25.

15. As Radia makes clear (paragraphs 65 to 69), a tribunal deciding that the claim/response had no reasonable prospect of success for costs purposes is not conducting the same analysis as for a strike out application. The Tribunal is not necessarily obliged to take the paying party's case at its highest, but rather can assess what the paying party knew (or ought reasonably to have known), and when, about the strengths/weaknesses of its case. In terms of what they knew (or should have known), a party is "likely to be assessed more rigorously if legally represented": Opalkova para 26.

16. As Opalkova also make clear, when there are multiple claims/complaints, the issue of bringing, or continuing, with a claim or response which had no reasonable prospect of success must be analysed separately for each complaint.

    16.1 The fact that one or more of the complaints succeeded would not – in itself - prevent a respondent from persuading the Tribunal that there were other complaints that had no reasonable prospect of success.

    16.2 Correspondingly, the fact that one or more of the complaints failed – that is that the response to that part of the claim succeeded - would not, in itself, prevent a claimant from persuading the Tribunal that part(s) of the response which dealt with the complaint(s) which did succeed had no reasonable prospect of success

17. Where the argument is that the party has acted "vexatiously, abusively, disruptively or otherwise unreasonably" then the only conduct that is taken into account is that which is (either the bringing of the proceedings or) the way that the litigation has been conducted. This ground can potentially be established even where the paying party has been successful in the litigation. The precise details of the conduct in question will be relevant both the (a) whether the criteria in Rule 76(1)(a) are met and/or (b) whether, in all the circumstances, the Tribunal should exercise its discretion to make a costs order.

18. If the criteria to potentially make a cost order are met, then the factors which are potentially relevant to the decision about whether to make such an order (and, if so, how much the award should be) include, but are not limited to, the following. However, the Tribunal's primary duty is to follow the wording of the rules, and to make specific decisions on the merits of the case in front of it.

18.1 Costs are the exception rather than the rule. A party seeking costs will fail if they do not demonstrate that the criteria for *potentially* making such an order (in the Tribunal rules) have been met. However, the mere fact alone that the criteria have been met does not establish that the general rule is to make a costs order in such circumstances.

18.2 Costs, if awarded, must be compensatory, not punitive. If the argument that there has been unreasonable conduct is made then the whole picture of what happened in the case is potentially relevant. However, it is necessary to identify the specific conduct, and decide what, specifically, was unreasonable about it and analyse what effects it had. Some causal link between the conduct and the costs sought by the other party is required. Yerrakalva v Barnsley [2011] EWCA Civ 1255.

18.3 Was the party warned that an application for costs might be made, and, if so, when, and in what terms.

18.3.1 The lack of such advance warning does not prevent an application being made (or the Tribunal granting it). Rule 77 gives a party up to 28 days after the date on which the judgment finally determining the proceedings was sent to the parties. Furthermore, while the rule give the other party the right to a reasonable opportunity to make representations in response to the application, it does not impose a requirement that they were warned before the application was made.

18.3.2 However, the issue of whether a party (especially a litigant in person) was aware of the possibility of having to pay costs is likely to be relevant. This can be demonstrated by something other than a costs warning from the opposing party: for example, comments made at a preliminary hearing; the fact that they had been involved an earlier case in which there was a costs application; the fact that they themselves had expressed an intention to seek costs from the other side.

18.3.3 If a warning has been made, its precise terms will be relevant. A simple boilerplate threat to apply for costs, which appears to a knee jerk response that the party (or its representative) always sends out is likely to be far less persuasive than a considered attempt to address the arguments raised by the other party, and explain why they have no prospect of success, or to explain why the particular conduct has been unreasonable, and what the rules or case management orders (specifically) require instead.

18.3.4 The timing of the warning will be relevant, as will the issue of whether the warning was updated and repeated at relevant stages.

18.3.5 The fact that a costs warning was made, even one which is clear and detailed and well-timed, and which identifies the precise basis on which the application was later made, does not guarantee that an order will be made.

18.4 What advice did the party have? Who from? When? It can be a double-edged sword that a party has taken legal advice. On the one hand, they might seek to argue that since a lawyer advised them that the claim had merit, it was not unreasonable to pursue it. On the other hand, the opposing party might seek to argue that (even if the paying party was a litigant in person at the Final Hearing) the fact that they had legal advice available shows that they ought to understood the claim was hopeless, and/or that their conduct was inappropriate, and/or that a settlement offer that had been made was a good one. To rely on the former argument, the paying party might have to waive privilege over the advice in question. However, there is no obligation to do so to defend itself against the latter inference; where privilege is not waived, the Tribunal will not make assumptions that the party specifically received advice that they were acting unreasonably, but the fact that advice was available to them is likely to undermine an argument that, as a litigant in person, they could not reasonably have been expected to anticipate the arguments being raised by the costs application.

Analysis and conclusions

Respondent's application

19. The Respondent is correct that a simple numerical tally of the allegations shows that the (vast) majority of the Equality Act 2010 ("EQA") complaints failed.

20. The fact that a complaint is unsuccessful does not, in itself, demonstrate either that the complaint had no reasonable prospect of success, or that the litigation was conducted unreasonably because that claim was (i) brought and (ii) not withdrawn.

21. The Respondent's application does not address the particular allegations one by one to say why each of them had no reasonable prospect of success. It does not even pull out a handful (the ones which, presumably, the Respondent would have thought were weakest and – therefore – gave it the strongest arguments in favour of demonstrating that the criteria in Rule 76(1)(a) and/or 76(1)(b) were met.)

22. It takes a much more broad brush approach and (apart from the general implication that if the Tribunal decided the complaint in the Respondent's favour then that should be seen as supporting the Respondent's costs arguments) it argues that the Claimant had not brought grievances (or allegations of discrimination) during employment.

23. To the extent that that assertion is true (and our liability reasons deal with the timings of correspondence in detail, as it was a feature of the liability hearing that the Respondent relied on the alleged lack of contemporaneous complaints; and we also take account of paragraph 22 of the Claimant's response to the application), the lack of a contemporaneous complaint or grievance about a particular alleged act or omission does not, in itself, imply that a later complaint to an employment tribunal had no reasonable basis.

24. Such matters are fact sensitive and the alleged perpetrators of the conduct in question were the two most senior people in a fairly small company, with the Claimant herself being a senior person. In those circumstances, the fact that the Claimant did not seek to raise a formal grievance sooner does not imply that she did not believe at the time that there was discrimination or harassment or victimisation.

25. In any event, whether she believed at the time that there was discrimination or harassment or victimisation or not is less relevant than whether she believed it when she issued proceedings and continued with the proceedings. She had lodged a grievance, and received a rejection outcome, prior to issuing proceedings.

26. She did not succeed in many of her complaints for the reasons that we gave. It does not follow that she did not genuinely believe that the decisions should have gone her way, and it does not follow that some or all of those complaints had "no reasonable prospects" of success.

27. Furthermore, even had there not been specific complaints based on these allegations, there would have been documents, witness evidence, cross-examination and submissions about many of these events as they were relevant background to the boardroom conversation in August 2020. We do not agree with the Respondent's assessment about how much shorter the hearing could have been if those matters were *only* background.

28. For those reasons, we are not satisfied that the criteria for a costs award are met, and nor are we satisfied that we would have exercised our discretion to make an award even had the qualifying conditions been satisfied.

Claimant's application

29. The Claimant's application refers to the Respondent's withdrawal from judicial mediation. This part of the Claimant's application fails. Judicial Mediation ("JM") is a confidential and without prejudice process. It is voluntary. Parties are encouraged to participate, but are free to withdraw if they wish. It is not appropriate for us to seek to go behind without prejudice privilege to consider the Respondent's reasons for withdrawal. However, hypothetically, a party which forms the view that

the JM would not succeed is not unreasonably increasing either side's costs by withdrawing before the JM as opposed after the JM has begun. The Respondent's representative's email of 9 May 2022 sets out its understanding of the position (which is arguably consistent with what the Claimant's representative had written earlier the same day). In any event, it is up to the Claimant to demonstrate that the Respondent's decision was unreasonable conduct of the litigation, and she has failed to do so.

30. The Claimant's application refers to a letter to the Tribunal dated 25 April 2023. That is clearly a typo, and the letter of 25 April 2022 has been considered.

31. The Claimant's application refers to an email from the Respondent's representative to the Tribunal dated 30 August 2022. That was not contained in the Claimant's representative's bundle, but is on the tribunal file and the panel has read it and taken it into consideration.

32. Subject to the clarifications just mentioned, our decision is that the Claimant's representative's letter of 6 September 2023 is factually accurate in identifying the tribunal orders which were made, and which were breached by the Respondent.

33. We proceed on the assumption that the health of the author of the 30 August 2022 email was accurately described in that email, although no medical evidence has been provided. We do not accept the assertion that the breaches of the Tribunal orders were "outside the control of the Respondent". The Respondent is required to comply with the Tribunal orders, and is not absolved from that obligation simply by appointing a legal representative. The email admitted the Respondent's breaches, and put forward some alleged justifications:

    33.1 That a previous case handler was no longer dealing with the matter (without a date being specified or a reason being given)

    33.2 That the new case handler had had absences from the office for health reasons (which were mentioned in the email, but without specific dates of, or durations of, specific absences)

    33.3 That there were insufficient resources for the Respondent's representative (Moorepay) to arrange for someone else to deal with the matter

    33.4 That there had been an "oversight" and that there had been "no deliberate intention to ignore the Tribunal orders".

    33.5 That it had informed the Claimant's representative of the reasons for the delays.

34. The response attached an email dated 15 June 2022 (so after the date for disclosure – 3 June 2022 - had passed) accepting that disclosure was late, and

stating it would be done by 24 June. It was not done, which led to the Claimant's representative's application of 25 July 2022.

35. The Respondent's representative's 30 August 2022 email was sent in response to the strike out warning issued as a result of the 25 July application. The Respondent's representative's response was sent 14 days after the warning, on the last day of the period given by the Tribunal. It noted that disclosure had now taken place. (So almost 3 months after the date by which lists had been due, and almost 2 months after the date by which copies had been due).

36. The Respondent's representative's 30 August 2022 email stated that the bundle (which was supposed to be agreed by 22 July and sent to the Claimant's representative by 26 August) would be done by 14 September. It was not, leading to the Claimant's representative's application to the Tribunal that day. It had still not been done by 26 October, leading to the Claimant's representative's application to the Tribunal that day.

37. On 15 November 2022, EJ Tobin wrote to the parties in the terms quoted by the Claimant's representative in its application. Despite that clear and unambiguous guidance, the Respondent remained in breach of the orders to exchange statements (which should have been by 7 October 2022, allowing the parties a reasonable time to prepare for the 10 day hearing starting 18 January 2023). This led to a further application dated 29 November 2022, and then EJ George making an UNLESS order, prior to the Respondent's belated compliance with the obligation to exchange statements.

38. Rule 76(1)(a) is satisfied. The Respondent or its representative has conducted the litigation unreasonably. The criteria in Rule 76(2) are also met. The Respondent has breached the tribunal's orders (and has done so on several occasions).

39. We remind ourselves that an award of costs is the exception rather than the rule, even if the criteria are satisfied.

40. In this case, we regard the Respondent's (or its representative's) conduct to be particularly unreasonable in that, despite the various warnings in the Claimant's representative's letters about (i) the need to comply and (ii) the potential consequences of not complying with the orders, it continued to breach the orders. Further, despite the fact that a strike out warning was issued, and the Tribunal decided not to strike out, based in part on the Respondent's representative's assurances in its 30 August 2022 email, the Respondent continued to miss deadlines, including the timescales which it said it would adhere to in that email.

41. Its delays were not merely by a day or two. The Claimant's representative application of 25 July 2022 came a long time after the disclosure order should have been completed (and a month after the Respondent's proposed revised deadline

of 24 June). Similarly, its 26 October application was required because, despite the reminders, the Respondent had still not complied with the already overdue deadlines, which it had acknowledged (via its representative) it was aware of in its 30 August response. The Respondent's actions caused the Claimant to incur additional costs.

42. This is an appropriate case in which to exercise the discretion to award costs. We are satisfied that the Respondent has the means to be able to afford an award of the size which we are considering.

43. The application is for £3107, being 11.3 hours at £275 per hour.

44. We are prepared to award costs for 10 hours work, disallowing the sums stated to be attributable to JM. We are satisfied that these costs were incurred as a result of the need to address the Respondent's breaches of the orders and unreasonable conduct.

45. We are prepared to award costs at the Band A rate for "National 1" in accordance with Solicitors' guideline hourly rates applicable for 2022. This is £261 per hour.

46. We therefore award £2610, which the Respondent is ordered to pay to the Claimant.

Employment Judge Quill

Date: 9 February 2024

JUDGMENT & REASONS SENT TO THE PARTIES ON

29/02/2024

FOR EMPLOYMENT TRIBUNALS