



EMPLOYMENT TRIBUNALS

Claimant

Respondents

Ms Forzana Khanom

v

Mishcon de Reya LLP

Heard at: London Central (in chambers)

On: 2 April 2024

Before: Employment Judge P Klimov

JUDGMENT

The Respondent's application for a costs order dated 13 March 2024 succeeds. The Claimant is ordered to pay the Respondent **£7,200** in respect of the Respondent's costs.

REASONS

Background

1. To understand the reasons in full, this Judgment should be read together with my judgment dated 27 February 2024, by which I dismissed the Claimant's claim for non-attendance of the hearing ("**the 27/02 Judgment**").
2. In the 27/02 Judgment I found that the Claimant's conduct of the proceedings had been such that it would have been appropriate for me to strike out her claim under the Rule 37 in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2017/1237 ("**the ET Rules**"). However, because it was a case management preliminary hearing (in private), this option was not open to me.
3. I, however, dismissed the Claimant's claim under Rule 47 of the ET Rules for the reasons explained in the 27/02 Judgment. The 27/02 Judgment was sent to the parties on 11 March 2024. The Claimant did not seek a reconsideration of the 27/02 Judgment.

4. On 13 March 2024, the Respondent submitted a costs order application, as the Respondent's Counsel had intimated at the hearing on 27 February 2024.
5. The Respondent's application is made under Rule 76(1)(a) on the basis that it was found by the 27/02 Judgment that the Claimant's "*actions were abusive, disruptive and that her conduct was unreasonable.*" The Respondent says that whilst it has incurred substantial costs due to the Claimant's unreasonable conduct, it seeks to recover only a portion of its costs, namely the brief fee of £7,200 incurred in respect of Counsel's attendance at the hearing on 27 February 2024. The Respondent attached the Counsel's fee note.
6. On 19 March 2024, on my instructions the Tribunal wrote to the Claimant, asking her to make representations on the Respondent's costs application and to provide information as to her ability to pay, if she wished the Tribunal to take this into account when deciding the application. The Claimant was given until 28 March 2024 to write back. She did not submit any representations on the application or information as to her ability to pay.

The Law

7. Rule 76(1) of the ET Rules states:

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

[...]

8. Rule 78(1) of the ET Rules gives the Tribunal various options of assessing costs, including making an "*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*".
9. The following key propositions relevant to the tribunal's exercising its power to make costs orders may be derived from the case law:
 - a. Costs awards in the employment tribunal are still the exception rather than the rule. The tribunals should exercise the power to order costs more sparingly than the courts (*Yerrakalva v Barnsley Metropolitan Borough Council and anor* 2012 ICR 420, CA)
 - b. There is a two-stage exercise in making a costs order. The first question is whether a paying party has acted unreasonably or has in

some other way invoked the jurisdiction to make a costs order. The second question is whether discretion should be exercised to make an order. Only if the tribunal decides to exercise its discretion to make an award of costs, the question of the amount to be awarded comes to be considered (Haydar v Pennine Acute NHS Trust UKEAT/0141/17).

- c. While the threshold tests for making a costs order are the same whether or not a party is represented, in the application of the tests it is appropriate to take account of whether a litigant is professionally represented or not. Litigants in person should not be judged by the standards of a professional representative (AQ Ltd v Holden [2012] IRLR 648).
- d. For term “vexation” shall have the meaning given by Lord Bingham LCJ in AG v Barker [2000] 1 FLR 759: “[T]he hallmark of a vexatious proceeding is ... that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceedings may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant, and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process.” (cited with approval by the Court of Appeal in Scott v Russell 2013 EWCA Civ 1432, CA)
- e. “Unreasonable” has its ordinary English meaning and is not to be interpreted as if it means something similar to ‘vexatious’ (Dyer v Secretary of State for Employment EAT 183/83).
- f. In determining whether to make a costs order for unreasonable conduct, the tribunal should take into account the “*nature, gravity and effect*” of a party’s unreasonable conduct — (McPherson v BNP Paribas (London Branch) 2004 ICR 1398, CA), however the correct approach is not to consider “nature”, “gravity” and “effect” separately, but to look at the whole picture.
- g. While a precise causal link between unreasonable conduct and specific costs is not required, it is not the case that causation is irrelevant. However, the tribunal must look at the entire matter in all its circumstances – (Yerrakalva v Barnley MBC [2012] ICR 420). Mummery LJ gave the following guidance on the correct approach:

“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. The main thrust of the passages cited above from my judgment in McPherson’s case was to reject as erroneous the submission to the court that, in deciding whether to make a costs order, the employment Tribunal had to determine whether or not there was a precise causal link between the unreasonable conduct in question and the specific costs being claimed. In rejecting that submission I had no intention of

giving birth to erroneous notions, such as that causation was irrelevant or that the circumstances had to be separated into sections and each section to be analysed separately so as to lose sight of the totality of the relevant circumstances”.

10. Costs awards are compensatory, not punitive – (*Lodwick v Southwark London Borough Council* [2004] ICR 884 CA).
11. Under Rule 84 of the ET Rule, the tribunal may, but is not required to have regard to the paying party’s ability to pay.
12. However, where the costs award may be substantial, the tribunal must proceed with caution before disregarding the paying party’s means – (*Doyle v North West London Hospitals NHS Trust* [2012] ICR D21, EAT).
13. The Presidential Guidance on General Case Management state:

“17. Broadly speaking, costs orders are for the amount of legal or professional fees and related expenses reasonably incurred, based on factors like the significance of the case, the complexity of the facts and the experience of the lawyers who conducted the litigation for the receiving party.”

18. In addition to costs for witness expenses, the Tribunal may order any party to pay costs as follows: 18.1 up to £20,000, by forming a broad-brush assessment of the amounts involved; or working from a schedule of legal costs; or, more frequently and in respect of lower amounts, just the fee for the barrister at the hearing (for example);

....

21. When considering the amount of an order, information about a person’s ability to pay may be considered. The Tribunal may make a substantial order even where a person has no means of payment. Examples of relevant information are: the person’s earnings, savings, other sources of income, debts, bills and necessary monthly outgoings.”

Analysis and Conclusion

14. Considering my findings and conclusions in the 27/02 Judgment (see paragraphs [31]-[35] and [41]), I am more than satisfied that the Claimant has acted unreasonably in the way she conducted the proceedings.
15. For the same reasons, I am also satisfied that the nature, gravity and extent of the Claimant’s unreasonable conduct justifies me exercising my discretion and making a costs order against her.
16. In the absence of any representations from the Claimant I see no mitigating circumstances to sway my discretion in her favour.
17. I considered whether it would be appropriate to make an award in the full amount sought by the Respondent. Ordinarily, I would have considered £7,500 to be a too high brief fee for a case management preliminary hearing, as to be awarded against the Claimant in full. However, the fee was incurred by the Respondent in anticipation that the hearing on 27 February would be the first day of a 4-day full merits hearing, which had to be vacated on short notice due to the Claimant being in persistent breach of the Tribunal’s orders

and her ongoing failure to engage with the Tribunal and the Respondent. Consequently, the first day of the hearing was converted to a case management preliminary hearing, which the Claimant did not attend.

18. The Claimant did not provide any information as to her ability to pay, despite being invited by the Tribunal to do so. Therefore, I have no “ability to pay” information I can have regard to in deciding whether to make an award and if so in what amount.
19. In these circumstances, I find that it is just and proper for me to make a costs order in the full amount of the brief fee, incurred by the Respondent for the Counsel’s attendance of the 27 February hearing.

Employment Judge P Klimov

2 April 2024

Sent to the parties on:

11 April 2024

.....

.....

For the Tribunals Office

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant (s) and respondent(s) in a case.