EMPLOYMENT TRIBUNALS

Claimant: Mr A Langerveld

Respondents: (1) Powys County Council
(2) Mr I Hammond
(3) Mr J Rawbone

Heard: in chambers **On:** 10 May 2024

Before: Employment Judge S Jenkins
Mrs J Beard
Mr A Fryer

JUDGMENT

The Respondent's application for a costs order is refused.

REASONS

Background

1. Following a judgment delivered at the conclusion of a seven-day hearing, on 25 September 2023, dismissing the Claimant's claims, the Respondent submitted an application for a costs order pursuant to rule 76 of the Employment Tribunals Rules of Procedure ("Rules"). The Respondent specifically contended that the Claimant had acted vexatiously in bringing the proceedings. Whilst the Respondent's total costs were put at £44,445, it limited its application to £20,000, i.e. the maximum sum that a Tribunal can order on a summary basis. The Claimant resisted the application.

Law

2. Rule 76(1)(a) provides that a costs order may be made, and that the Tribunal 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;*"

3. Rule 77 deals with the procedure for making a costs application and provides as follows:

"*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.*"

4. In that regard, the Respondent had submitted a written application within the applicable time period, and the Claimant had also responded in writing. In the circumstances, we considered that we could consider the application in light of those written representations, without requiring a hearing. There were then, unfortunately, some delays in scheduling a day for the tribunal to convene to consider the costs application.

5. The general approach to be applied by Tribunals when considering costs applications has been clarified by the appellate courts on several occasions. In Gee v Shell UK Ltd [2003] IRLR 82, Sedley LJ said:

"*It is nevertheless a very important feature of the employment jurisdiction that it is designed to be accessible to ordinary people without the need of lawyers, and that, in sharp distinction from ordinary litigation in the United Kingdom, losing does not ordinarily mean paying the other side's costs.*"

6. The Court of Appeal reiterated, in Yerrakalva v Barnsley Metropolitan Borough Council and anor [2012] ICR 420, that costs in the employment tribunal are still the exception rather than the rule. It commented that the tribunal's power to order costs is more sparingly exercised and is more circumscribed than that of the ordinary courts, where the general rule is that costs follow the event and the unsuccessful litigant normally has to foot the legal bill for the litigation. In most cases the employment tribunal does not make any order for costs. If it does, it must act within rules that expressly confine the tribunals power to specified circumstances, notably unreasonableness in the bringing or conduct of the proceedings. The tribunal manages, hears and decides the case and is normally the best judge of how to exercise its discretion.

7. In Millan v Capstick Solicitors LLP and others (UKEAT/0093/14), Langstaff J, the then President of the EAT, described the exercise to be undertaken by the Tribunal as a three-stage exercise, which can be paraphrased as follows:

    1. Has the putative paying party behaved in the manner proscribed by the Rules?

    2. If so, the Tribunal must then exercise its discretion as to whether or not it is appropriate to make a costs order. It may take into account ability to pay in making that decision.

    3. If the Tribunal decides that a costs order should be made, it must decide what amount should be paid or whether the matter should be referred for assessment. The tribunal may take into account the paying party's ability to pay.

8. The appellate courts have also made clear that a litigant in person should not be judged by the same standards as a professional representative, as the self-representing may lack the objectivity and knowledge of law and practice that a professional representative will (or ought to) bring to bear. In AQ Ltd v Holden [2012] IRLR 648, HHJ Richardson noted:

"The threshold tests in rule 40(3)[1] are the same whether a litigant is or is not professionally represented. The application of those tests should, however, take into account whether a litigant is professionally represented. A tribunal cannot and should not judge a litigant in person, by the standards of a professional representative … Justice requires that tribunals do not apply professional standards to lay people, who may be involved in legal proceedings for the only time in their life … lay people are likely to lack the objectivity and knowledge of law and practice brought by a professional legal adviser. Tribunals must bear this in mind when assessing the threshold tests in rule 40(3). Further, even if the threshold tests for an order for costs are met, the tribunal has discretion whether to make an order. This discretion will be exercised, having regard to all the circumstances. It is not irrelevant that a layperson may have brought proceedings with little or no access to specialist help and advice.

"This is not to say that lay people are immune from orders for costs: far from it, as the cases make clear. Some litigants in person are found to have behaved vexatiously or unreasonably even when proper allowance is made for their inexperience and lack of objectivity…".

9. The Respondent put its application on the basis that the Claimant had acted "vexatiously" in in the bringing of the proceedings. In ET Marler Ltd v Robinson [1974] ICR 72, the NIRC defined "vexatious" conduct as follows; "*If an employee brings a hopeless claim not with any expectation of recovering compensation but out of spite to harass his employers or for some other improper motive, he acts vexatiously*". That suggests that for conduct to be vexatious there must be evidence of some spite or desire to harass the other side, or the existence of some other improper motive.

Conclusions

10. We noted the approach that should be taken in relation to considering applications for costs orders and, as directed by the EAT in Millan, we focused first on whether the putative paying party, i.e. the Claimant, had behaved in the manner proscribed by the rules, i.e. had been vexatious in bringing the proceedings.

11. Whilst no written reasons had been requested following the delivery of the oral Judgment, the Judge's notes of the Judgment remained available and were taken into account.

12. We considered that the Claimant's approach within the workplace, both in relation to his duties and his relationships with his colleagues, in particular, his manager, could at times have been described as "vexatious", using the word in its ordinary sense of being troublesome or annoying, as opposed to

[1] The cost rule in the predecessor rules to the current Rules.

the legal sense.

13. In relation to the acts of unwanted conduct or detrimental treatment that the Claimant had asserted had amounted to harassment and/or victimisation, we noted that many of the allegations advanced by the Claimant involved conduct on the part of his managers which could not be criticised. We further concluded that, even where criticisms could be advanced, the actions of the managers tended to follow actions of the Claimant, and were, in essence, retaliatory, being undertaken in response to the Claimant's actions in trying to provoke a response from his managers.

14. We noted, by way of example, that the Claimant had, in his written witness statement, noted that he had consciously refused to wipe Brasso off door handles following a request from his manager, noting, "*I had hoped that my refusal to take the Brasso off would send a clear message that I did not appreciate her behaviour.*".

15. Broadly, we perceived the Claimant as someone who had very clear and confirmed views about matters in the workplace, about how he should conduct himself, and how others should conduct themselves. That view was not however shared by others on many occasions, and our conclusions were that it was largely the Claimant who had been responsible for difficulties in the workplace arising from differences of view.

16. In addition to the example described above, we noted a further example of an incident on 30 January 2020, where the Claimant had gone to use a shower, despite having been told by the Second Respondent not to do so, and had covertly recorded his visit. Our conclusion was that the Claimant was fully aware that he did not have permission to use the shower and should not have been on the relevant floor, and consciously went there to cause a scene, covertly recording it, to make a particular point.

17. We had therefore concluded, in relation to the Claimant's claims, that any unwanted conduct or detrimental treatment, if it had occurred, had not had the effect of violating the Claimant's dignity because it had arisen in response to situations that the Claimant had, whether consciously or not, engineered.

18. However, we were of the view that the Claimant, at all times, including during the hearing in September 2023, genuinely felt that he was in the right, and that he had been adversely treated. In our view, whilst the Claimant's claim may have been objectively unlikely to succeed, it was not pursued out of spite, to harass his employer, or for some other improper motive, as outlined in the Robinson case.

19. There was, in our view, no evidence of spite on the Claimant's part or desire to harass the Respondents. Whilst the Claimant was, as we found, objectively unjustified in holding the views that he did, even to the extent that we perhaps would go as far as to describe him as deluded in holding the views about the Respondents' behaviour that he did, we nevertheless felt that the Claimant did genuinely hold those views.

20. Ultimately therefore, we could not say that the Claimant had acted

vexatiously in the context required for the purposes of an application under rule 76(1)(a). That was particularly the case in the context of the Claimant being a litigant in person, HHJ Richardson in the Holden case, noting that a self- representing person may lack the objectivity and knowledge of law and practice that a professional representative may bring to bear.

21. It may well have been that, had the Claimant sought professional representation, the difficulties in establishing his case would have been made clear to him, which might have meant that the claim would not have been brought. However, the Claimant did not take such professional advice and, as we have noted, remained convinced in his worldview that he had been wronged. The content of his written submissions in response to the Respondent's costs application, suggests that he remains of that view.

22. Whatever our conclusions on the objective reasonableness of the Claimant holding those views, we were, as we have noted, satisfied that he genuinely subjectively holds them. In the circumstances, we could not ascribe any spiteful, harassing, or other improper motive to the bringing of the claims, and did not consider therefore that he had acted vexatiously in bringing the claim. We therefore concluded that the Respondent's application should be refused.

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Employment Judge S Jenkins
Date: 10 May 2024

JUDGMENT SENT TO THE PARTIES ON 13 May 2024

FOR THE TRIBUNAL OFFICE Mr N Roche