Case Numbers: 2206947/2021

Reserved Judgment

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**and**	**Respondents**
Ms L		**Commissioners for HM Customs & Excise**

JUDGMENT ON COSTS OF THE EMPLOYMENT TRIBUNAL

SITTING AT: London Central **ON: 4 June 2024**

BEFORE: Employment Judge A M Snelson **MEMBERS: Mr P de Chaumont-Rambert**
Mr D Shaw

On hearing the Claimant and Mr D Mitchell, counsel, on behalf of the Respondents, the Tribunal orders the Claimant to pay to the Respondents a contribution towards their costs in the sum of £20,000.

REASONS

Introduction

1 By a reserved judgment with accompanying reasons running to 211 paragraphs sent to the parties on 19 February 2024 following a hearing held on 8-18 January, this Tribunal dismissed all the Claimant's numerous claims either on withdrawal or on their merits and held that all bar a handful also failed on the ground that they had been presented out of time and so fell outside the Tribunal's jurisdiction. That document should be read alongside these reasons.

2 On 18 March 2024 the Respondents presented an application for costs on various grounds. They stated that their costs of resisting the claims had exceeded £175,000 inclusive of VAT and disbursements, but limited their application to £20,000, the maximum sum awardable without a detailed assessment.

3 The Claimant responded, resisting the application and giving detailed grounds for doing so.

4 The costs application came before us on 4 June 2024 in the form of a 'remote' hearing by CVP. As before, the Claimant appeared in person and the Respondents were represented by Mr D Mitchell, counsel.

5 Having heard argument from both sides, we reserved judgment because time was tight and two members of the Tribunal had other sitting commitments.

The applicable law

6 The power to make costs awards is contained in rule 76 of the Employment Tribunals Rules of Procedure 2013 ('the 2013 Rules'), the material part of which is the following:

> **(1) A Tribunal may make a costs order … , and shall consider whether to do so, where it considers that –**
>
> **(a) a party … 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.**

7 By the 2013 Rules, r39(5)(a) it is provided that, where, following the making of a deposit order, a Tribunal decides the allegation or argument in respect of which the deposit order has been made against the 'paying party' for substantially the reasons given in the deposit order, the paying party shall be treated as having acted unreasonably in pursuing that allegation or argument unless the contrary is shown.

8 As the case-law explains, rule 76(1) poses two questions: first, whether the Tribunal has power to make an order; second, if so, whether the discretion should be exercised (see *eg Oni v Unison* [2015] UKEAT/0370/14).

9 By rule 84 it is provided that, when considering whether to make a costs order and, if so, in what amount, the Tribunal 'may' have regard to the putative paying party's ability to pay any award.

10 We are mindful of the fact that orders for costs in this jurisdiction are, and always have been, exceptional. Employment Tribunals exist to provide informal, accessible justice for all in employment disputes. We recognise that, if Tribunals resorted to making costs orders with undue liberality, the effect might well be to put aggrieved persons in fear of invoking the important statutory protections which the law affords them. It would be contrary to the purpose of the Tribunals if parties to disputes decided against exercising their right to bring (or contest) proceedings as a result of unfair economic pressure. On the other hand, we also bear in mind that, when our rules of procedure were revised in 2001, the Tribunal was for the first time not merely permitted, but obliged, to consider making a costs order where any of the prescribed conditions (vexatiousness, abusiveness etc) was fulfilled, and a new and wider criterion of unreasonableness was added. It seems to us that these innovations, preserved in subsequent revisions of the rules, indicate a policy on the part of the legislature to encourage Tribunals to exercise their costs powers more freely than they did in the past, where unmeritorious claims or defences are

pursued or where the manner in which litigation is conducted is improper or unreasonable.

11 Where the discretion to make a costs order is engaged, the Tribunal must have regard to all relevant circumstances. One factor which is often significant is whether the putative 'paying party' has, or has not, been legally represented. The Tribunal has been warned against judging unrepresented litigants by the same standards as professional representatives (see *eg AQ Ltd v Holden* [2012] IRLR 648 EAT).

12 The word 'may' in r84 means what it says: it conveys a discretion. But the Employment Appeal Tribunal has commented that it will very often be appropriate to take account of means and the Tribunal should always give reasons for its decision whether or not to do so (see *Jilley v Birmingham & Solihull Mental Health NHS Trust* UKEAT/0584/06 and UKEAT/0155/07).

Materials

13 We had before us a bundle of documents, the Claimant's one-page statement directed to the subject of her means and Mr Mitchell's skeleton argument and the Claimant's written submissions.

The rival cases on costs

14 The parties have argued their positions very fully on paper and their contentions can largely be left to speak for themselves. In bare summary, Mr Mitchell submitted that a costs order was justified because: (a) the Claimant had acted vexatiously, abusively, disruptively or otherwise unreasonably in bringing the proceedings or in the manner in which they had been conducted; (b) the claims had had no reasonable prospect of success; and (c) the Claimant had acted unreasonably in persisting with claims which have been made the subject of deposit orders. Moreover, the Tribunal should exercise the power to award costs because this was a bad case and the Claimant had sufficient means to find the modest sum claimed.

15 The Claimant's resistance to the application consisted largely of a vituperative attack upon Mr Mitchell, against whom she levelled a litany of allegations of professional misconduct of the most serious kind, for none of which we could see the slightest evidential foundation. Although we read these allegations in her written submissions, we did not permit her to renew them in oral argument, instead insisting that she focus on responding to the application in hand. In summary, she resisted the application on the following grounds: (a) her claims were valid and well-founded and the Tribunal was at fault in not 'hearing' them; (b) the Tribunal had failed to appreciate that the entire story of the enquiry into her alleged misconduct had missed the point that *she* was the victim, first of criminal conduct by third parties and second of mistreatment by the Respondent, its employees and agents; and (c) in all the circumstances, there was no warrant for any costs order against her. Asked about her means, she readily accepted that she had sufficient assets to meet an award of up to £20,000 being the joint owner of a property with a market value of £900,000, subject to a mortgage of £170,000.

Analysis and conclusions

16 As noted above, the first question is whether the Tribunal has jurisdiction to make a costs order at all. We are satisfied to a high standard that the Claimant acted unreasonably in bringing and pursuing her claims, and that the test under the 2013 Rules, r76(1)(a) is satisfied. We have a number of reasons for this view. First, the case largely rested on complaints about acts or events about which no reasonable complaint could be made. Examples include the numerous groundless complaints about the manner in which the disciplinary and grievance procedures were conducted and the hopeless argument that the Claimant's data protection rights precluded the Respondent from investigating the facts at all. Second, the unreasonableness of pursuing numerous groundless complaints was compounded by the fact that they had been carefully examined and, on compelling grounds, rejected at numerous prior stages (not only by internal decision-makers but also by specialist, independent bodies including the Information Commissioner and the High Court). Third, the experience of being on the receiving end of two costs orders (one in the High Court and one in the Tribunal) should have served as an additional warning of the dangers of embarking on and persisting with this litigation. Fourth, the Claimant had the benefit of the general warning from Employment Judge Burns in her deposit order sent to the parties 20 December 2022 that many of her claims were weak and likely to fail. (For the avoidance of doubt, we rely on this point as general support for the proposition that the Claimant acted unreasonably in bringing and pursuing her claims. We do not find it necessary to consider whether the special provision under the 2013 Rules, r39(5)(a) is engaged in relation to any particular claim.)

17 Given that, as we have found, we have a discretion to make a costs order, should we exercise it? In our judgement, this is most certainly a proper case in which to exercise the power to award costs. We consider that this litigation has been reckless in the extreme. The Claimant is a mature woman. She has the advantages of experience and considerable intelligence. She told us that she holds seven degrees. The factors which persuade us that we have jurisdiction to make a costs order are equally powerful in arguing for the power to be exercised. It seems to us obvious that, most regrettably, the Claimant has consistently closed her mind to the possibility (we would say overwhelming probability) that most, if not all, of her complaints would prove not to be well-founded, despite being faced repeatedly with reasons, carefully explained, for why that was so. The right to litigate carries with it the responsibility to do so only for good cause, based on a careful assessment of the merits of the proposed claim and the defences which will be raised to it. There is no sign of any such assessment on the Claimant's part, either before or at any point during the long life of this case. Rather, her approach has been simply to insist that she is right and anyone who says otherwise is wrong. That is a grossly irresponsible approach to take.

18 We must add that we have given careful consideration to whether the Claimant's mental health disability argues against the making of a costs order. In the end, we have concluded that it does not. We have three reasons. First, as noted in our original reasons (para173), the disability has resulted in symptoms of varying severity, and it is no part of the Claimant's case to maintain that it affected

her cognitive functions, rationality or judgement, at least during very considerable periods before and after the commencement of these proceedings. Second, the Claimant resists the costs application on grounds which would be inconsistent with us taking her mental health into account. She maintains that every claim and argument which she has advanced has been justified, and that she is above criticism in all aspects. It seems to us that it would be incompatible with the cases advanced on both sides for us to treat her mental health condition as relevant mitigation in relation to costs. It is not for us to make a case on costs for the Claimant which is at variance with the case which she has put before us. Third and in any event, we are not medically qualified and are not in a position to make a safe assessment ourselves as to whether there is or may be a medical explanation which could excuse, or serve as mitigation for, her behaviour as a litigator.

19 For the reasons stated, we are satisfied that it is proper to make a costs order. What sum should we award? In our judgment, subject to the question of the Claimant's means, the proper award is in the sum asked, £20,000. That represents a tiny fraction of the costs incurred by the Respondent as a consequence of the Claimant's unreasonable actions in bringing and pursuing numerous unsustainable and baseless claims.

20 We have had regard to the Claimant's means. She rightly acknowledges that her assets are such that she can meet an award in the sum claimed.

21 For all of these reasons, we award costs in the sum of £20,000.

22 Given our reasoning above, it is not necessary for us to address the other grounds on which the costs application was based.

Employment Judge Snelson

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28 July 2024

Judgment entered in the Register and copies sent to the parties on 1 August 2024

.... for Office of the Tribunals