EMPLOYMENT TRIBUNALS

Claimant: Ms L Gallagher
Respondent: Essity UK Ltd
On: 18 September 2024
Before: Employment Judge Daniels

Appearances
Claimant: Did not appear
Respondent: Mr S Crawford (counsel)

REASONS FOR COSTS JUDGMENT

Background

1. I refer to the costs judgment of today's date. To understand the reasons in full for that judgment, these reasons should be read together with my judgment dated 7 June 2024, by which I struck out and dismissed all of the Claimant's claims ("the June Judgment").

2. In the June Judgment I found that the Claimant's conduct of the proceedings had been such that it was 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").

3. The June Judgment was sent to the parties on 7 June 2024. The Claimant did not seek a reconsideration of the Judgment.

4. The Respondent's costs application is made under Rule 76(1)(a) on the basis that it was found by the June Judgment, inter alia, that the Claimant's conduct was abusive, disruptive and/or unreasonable conduct.

6 The Respondent says that whilst it has incurred substantial costs due to the Claimant's conduct, it seeks to recover only a portion of its costs, namely fees of £20,000 incurred, including VAT. It first says that costs should be calculated from the date of its costs warning (25 May 2023) such costs being £33,991.20. Alternatively, the respondent seeks costs from the date of the deposit order dated 11 January 2024, such costs being £23,332.80. A full breakdown was provided of each.

7. The Claimant did not submit any representations on the application or information as to her ability to pay as she was requested to do by the respondents in correspondence. The claimant sought to postpone today's hearing but that application was not successful (see separate order).

The Law

8 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 [...]

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: Costs awards in the employment tribunal are still the exception rather than the rule.

10 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**)

11 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.

12 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**).

13 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**).

. "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**).

14 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.

15 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*".

16 Costs awards are compensatory, not punitive – (**Lodwick v Southwark London Borough Council [2004] ICR 884 CA**).

17 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. 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**).

The Presidential Guidance on General Case Management states:

"*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 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."

The Respondent's application for costs

19 The respondent's application for costs is made under rule 76(1)(a))

A party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in the bringing or conducting of proceedings (or part thereof) — rule 76(1)(a).

20 The respondent submitted that this imposes a three-stage test:

a. First, the tribunal must ask itself whether a party's conduct falls within rule 76(1)(a) — in other words, is its costs jurisdiction engaged?
b. If so, secondly, it must go on to ask itself whether it is appropriate to exercise its discretion in favour of awarding costs against that party?
c. The third stage is the determination of the amount of any award.

21 The respondents relied upon **Yerrakalva v Barnsley Metropolitan Borough Council [2012] ICR 420** and said this provides guidance as to the correct approach to be adopted. Mummery LJ said:

'*As costs are in the discretion of the ET, appeals on costs alone rarely succeed in the EAT or in this court. The ET's power to order costs is more sparingly exercised and is more circumscribed by the ET's rules than that of the ordinary courts. There the general rule that costs follow the event and the unsuccessful litigant normally has to foot the legal bill for the litigation. In the ET costs orders are the exception rather than the rule. In most cases the ET does not make any order for costs. If it does, it must act within rules that expressly confine the ET's power to specified circumstances, notably unreasonableness in the bringing or conduct of the proceedings. The ET manages, hears and decides the case and is normally the best judge of how to exercise its discretion.*

There is therefore a strong, soundly based disinclination in the appellate tribunals and courts to upset any exercise of discretion at first instance. In this court permission is rarely given to appeal against costs orders. I have noticed a recent tendency to seek permission more frequently. That trend is probably a consequence of the comparatively large amounts of legal costs now incurred in the ETs.

An appeal against a costs order is doomed to failure, unless it is established that the order is vitiated by an error of legal principle, or that the order was not based on the relevant circumstances. An appeal will succeed if the order was obviously wrong. As a general rule it is recognised that a first instance decisionmaker is better placed than an appellate body to make a balanced assessment of the interaction of the range of factors affecting the court's discretion. This is especially so when the power to order costs is expressly dependent on the unreasonable bringing or conduct of the proceedings. The ET spends more time overseeing the progress of the case through its preparatory stages and trying it than an appellate body will ever spend on an appeal limited to errors of law. The ET is familiar with the unfolding of the case over time. It has good opportunities for gaining insight into how those involved are conducting the proceedings. An appellate body's concern is principally with particular points of legal or procedural error in tribunal proceedings, which do not require immersion in all the details that may relate to the conduct of the parties. ...

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 ...

22 The respondents accepted that an employment 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. They noted that HHJ Richards in **AQR v Holden [2012] IRLR 648** stated as follows:

The threshold tests in rule 40(3) are the same whether a litigant is or is not professionally represented. The application of those tests may, however, must 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. Lay people are entitled to represent themselves in tribunals; and, since legal aid is not available and they will not usually recover costs if they are successful, it is inevitable that many lay people will represent themselves. 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. As Mr Davies submitted, 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 lay person may have brought proceedings with little or no access to specialist help and advice.

Vexatious conduct

23 The respondents referred also to the **Court of Appeal in Scott v Russell 2013 EWCA Civ 1432, CA** (a case concerning costs awarded by an employment tribunal), cited with approval the definition of ‘vexatious’ given by Lord Bingham in Attorney General v Barker 2000 1 FLR 759, QBD (Div Ct). According to His Lordship:

‘the 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’.

24 The respondent suggested that where the effect of the conduct falls within Lord Bingham’s stringent definition, this can amount to vexatious conduct, irrespective of the motive behind it.

Unreasonable conduct

25 The respondent then relied upon **Ghosh v Nokia Siemens Networks UK Ltd EAT 0125/12** where the EAT upheld an employment tribunal's costs order against a claimant who had made a number of 'wholly unsubstantiated allegations' of discrimination. Making such serious and unsubstantiated allegations was, in the EAT's view, 'undoubtedly' capable of amounting to unreasonable conduct. HHJ Serota QC stated:

"31*The exercise of the costs jurisdiction is discretionary once the threshold of unreasonable conduct is crossed. In the light of the Respondent's concession we could see little point in pursuit of this appeal. The Claimant might wish to establish that for costs purposes she did not act unreasonably but the findings against her in the liability hearing, which are significantly damaging to her, remain in place in any event. In this case the Employment Tribunal was well entitled to find that the Claimant's conduct was unreasonable. There were a large number of allegations of discriminatory conduct — serious allegations, we say — which were rejected. Some were rejected on the basis that what the Claimant asserted had happened had not in fact happened. The Claimant's conduct in the proceedings and making these unsustained allegations was undoubtedly capable of amounting to unreasonable conduct.*

> *32. In the circumstances, the Employment Tribunal was entitled to conclude that the number of wholly unsubstantiated allegations against a manager who in fact was supportive of her, that put the Claimant to great expense at the nine day hearing, plus the considerable preparation, justified it in exercising its discretion to make the order that it did. The suggestion that the order that we have made will somehow discourage litigants from pursing cases is wide of the mark. The only litigants who might be discouraged are those who are tempted to behave unreasonably. In all the circumstances, we consider that this appeal is without merit and it is dismissed.* "

26 The respondents also referred to Mummery LJ in **Yerrakalva v Barnsley Metropolitan Borough Council [2012] ICR 420** (see above).

Relevant findings from Strike Out judgement

27 The respondent submitted that the relevant findings from the strike out judgment taken from the written reasons were as follows:

a. On 25 May 2023, prior to filing the Respondent's defence, the respondent sent the Claimant a cost warning letter. Within this letter, it was explained to the Claimant that the Respondent would be making an application for strike out of her claims on grounds of scandalous and vexatious behaviour and inability to have a fair trial, (para 2.2)
b. The Claimant responded to this email on 19 June 2023 at 18:15. Within this email, the Claimant submitted to the Employment Tribunal that "The sexual assault took place and this was never in doubt, it has gone to the CPS. Please see attached witness email from Ian to met police (email headed sexual assault)", (para 2.5)
c. The Claimant then attached an email thread to her email to the Employment Tribunal as alleged evidence. This email thread was between PC Sanna, 3462 CN, Ian

Lawrence (ilawrence76@yahoo.com) and the Claimant. Within this email thread a Mr "Ian Lawrence" purported to have witnessed the alleged sexual assault on the Claimant. (para 2,6)
d. On the balance of probabilities, I find this was a false statement.. (para 2.8)
e. In the Bunzl proceedings the sick note was alleged by the claimant to have been written and signed by Dr Silva De Minor at Genesis Care. In these current proceedings, the Claimant alleges that the sick notes were written and signed on behalf of Dr Nathan Coombs by an unspecified nurse., (para 2.11)
f. By comparing the sick notes at pages [64, 65] from these proceedings, with the sick note provided in the Bunzl proceedings [63], I find that on the balance of prob abilities these were written by the same person. The handwriting and signatures on the sick note are identical, despite the Claimant alleging that they have been completed by two different doctors or two different medical centres, (para 2.12)
g. On balance I find these notes were also compiled by the claimant falsely, (para 13)
h. Importantly, the claimant had very little indeed to say about the key issues around her alleged fabrication of documents. She made a general comment that these things were "untrue and false" but did very little to try and show this. Indeed, she appeared to wish to repeatedly avoid the issue. The weakness of her evidence was striking to me. Many of her attempted explanations simply did not hold water and she frequently did not seek to mount a serious challenge to the many inconsistencies and implausibilities of her attempted explanations, on the "fabrication issue" but frequently moved off the topic or referred to something unrelated, (para 15)
j. This medical certificate was found to be fraudulent by Employment Judge Eeley. The Claimant has now alleged that two different doctors from Ridgeway Health created the medical certificates which is inconsistent with what she said before. Moreover, this appears to be a striking change in her case. It is not credible. (Para 17.9)
On the balance of probabilities, I also find that these documents were fabricated by the claimant. The fact the metadata strongly appears to place these photos as made in October 2022 (not 2020) is firstly crucial, (para 17.8)

k I find that for all these reasons the proceedings have been conducted scandalously or unreasonably because the claimant has repeatedly provided false evidence during the course of these Employment Tribunal proceedings. She has directly deployed and tried to rely on such dishonest evidence in letters to the Tribunal and in her claim,
(para 17.10)

l This is not a one-off situation but a series of very serious issues which place an overriding hole in her whole case and her evidence..
(para 18 (ii).)

A fair trial is now impossible in my view. This is not marginal but clear to me. A case simply cannot proceed fairly when one side, based on multiple examples of seriously unreasonable conduct, cannot be trusted to give truthful or reliable evidence under oath. There cannot be a fair hearing where one side acts with integrity but the other side is prepared not to do so, para 18(iii)

Further Submissions

28 The respondent also made further contentions as follows.

29 That the claimant was advised by her Union about her present claims. It says she is not therefore equivalent to a litigant in person without access to legal advice.

30 That the claimant was warned from the outset by the Respondent solicitors that her conduct might amount to abusive and vexatious behaviour and that it would make an application for costs.

31 That the claimant has been found to be deliberately deceitful by which she was seeking to abuse and debase the tribunal and the tribunal's process as enshrined in the overriding objective. That the proven acts of dishonesty amounted to a repetition of very similar if not exactly the same acts of dishonest in the Bunzl case. The claimant is therefore a "recidivist" (repeat offender) of vexatious and unreasonable conduct

32 That on the findings in the written reasons for the strike out hearing, it is clear that the tribunal can conclude that the acts of dishonesty by the claimant were at the inception of the claim and that dishonesty was at the heart of the claim itself. Such conduct undermines the integrity of the tribunal system.

33 That despite acts encouraging reflection on her actions in pursuing these claims in the tribunal, the claimant has persisted until requiring a strike out hearing to be heard in full. The acts encouraging reflection include: costs warnings; the content of the grounds of resistance; the deposit order hearing and the written reasons making the respective deposit orders (see in particular paras23 – 38 at pp68-70); the application to strike out.

34 It was submitted that for the submissions set out the claimant's conduct falls generously within the parameters of rule 76(1)(a).

35 Further it was submitted that it is appropriate for the tribunal to exercise its discretion in favour of awarding costs. The respondent has been put to significant cost and inconvenience by her act of bringing the claim.

36 The respondents say calculation of the amount of the award should contemplate the maximum amount. The respondent should not have been encumbered with resisting a spurious claim based on deception and deceit. The claimant has not maintained forwarding contact details and the respondent has done all it reasonably can to try and encourage contact in order that the tribunal can consider the claimant's means.

Conclusions

37 Considering my findings and conclusions in the June Judgment, I am more than satisfied that the Claimant has acted abusively, disruptively and unreasonably in the way she has conducted these proceedings.

38 The claimant was advised by her Union about her present claims. She is not equivalent to a litigant in person without access to legal advice. I also note that the

claimant was warned from 25 May 2023 by the Respondent solicitors that her conduct might amount to unreasonable and vexatious behaviour and that it would make an application for costs. There was then the detailed deposit order reasons dated 7 February 2024.

39 The claimant was found to be deliberately deceitful in the June Judgment. The key findings are listed above.

40 These acts of dishonesty amounted to a repetition of very similar if not exactly the same acts of dishonesty in the Bunzl case. The claimant is therefore a repeat offender in vexatious and unreasonable conduct. These acts also made a fair trial impossible.

41 I conclude that the acts of dishonesty by the claimant were at the inception of the claim and that dishonesty was at the heart of the claim itself. I find that such conduct made a fair trial impossible and undermined the integrity of the tribunal system. The claimant's conduct easily satisfies the threshold of abusive, disruptive and unreasonable conduct.

42 Despite acts encouraging reflection on her actions in pursuing these claims in the tribunal, the claimant persisted until requiring a strike out hearing to be heard in full. The acts encouraging reflection include: costs warnings; the content of the grounds of resistance; the deposit order hearing and the written reasons making the respective deposit orders (see in particular paras 23 – 38 at pp 68-70 of this Bundle); and the application to strike out.

43 For the same detailed reasons, as set out above I am also entirely satisfied that the nature, gravity and great extent of the Claimant's disruptive and unreasonable conduct fully and clearly justifies me exercising my discretion and making a costs order against her.

44 I have seen no mitigating factors or representations from the Claimant and in any event I see no mitigating circumstances that may exist in her favour to sway my discretion in her favour.

<u>The amount of a costs award</u>

45 I considered whether it would be appropriate to make an award in the full amount sought by the Respondent. The Claimant did not provide any information as to her ability to pay, despite being invited by the respondent 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. I am considering making an award of up to £20,000.

46 I could proceed to make an appropriate award in any event. However, in these circumstances, I have instead decided to order the claimant to provide information as to her means within 14 days and I will then consider any appropriate award to be made, an approach which I conclude would be in the interests of justice.

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Employment Judge Daniels

Date: 18 September 2024

SENT TO THE PARTIES ON

17/10/2024

FOR THE TRIBUNAL OFFICE