



EMPLOYMENT TRIBUNALS

Claimant: Ms E Hennell-Whittington

Respondent: W Metcalfe & Sons Ltd

JUDGMENT having been sent to the parties and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

The Application

1. Oral reasons have been given to the parties on 22 September 2023, dismissing the claimant's complaints of sex discrimination and harassment related to sex, the respondent made an application on 16 October 2023 for its costs. The application was made pursuant to rule 76(1)(a) in that the claimant was alleged to have behaved unreasonably in the bringing of proceedings and in the conduct of the proceedings acted unreasonably. It contended, further or in the alternative, it contended that that a costs order should be made pursuant to rule 76(1)(b) i.e. that the claim had no reasonable prospects of success.

Legal Principles

2. Rule 76 of the Employment Tribunal Rules of Procedure 2013 ("the ET Rules") govern the awarding of costs by the Tribunal. So far as is relevant, it provides:

"76. Where a costs order or 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; or
(b) any claim or response had no reasonable prospect of success. . .

3. The tribunal has a duty in the exercise of its powers under the relevant provisions of the Rules, to give effect to the overriding objective.
4. Unrepresented parties are not be held to the standards of a legally represented party: **AQ Ltd v Holden** [2012] IRLR 648 EAT.
5. It is common ground that the Tribunal must apply a two-stage process: first, it must decide if the claimant's conduct reached the threshold of unreasonable conduct under rule 76(1)(a); second, if so, whether to exercise its discretion to make a costs order against the claimant, and if so, in what amount: **Vaughan v London Borough of Lewisham** 2013 IRLR 713, at paragraph 5.
6. The task of the Tribunal in exercising its discretion is to look at the whole picture of what happened in the case and decide whether there has been unreasonable conduct by the claimant in conducting the case and if so, to identify the conduct, what was unreasonable about it, and what effect it had. However, there is no requirement for a precise correlation between the conduct and the costs incurred: **Yerrakalva v Barnsley Metropolitan Borough Council** 2012 ICR 420, following **McPherson v BNP Paribas (London Branch)** 2004 ICR 1398).
7. In the Employment Tribunals, costs orders are the exception rather than the rule: **Yerrakalva**; *Gee v Shell UK Limited* 2003 IRLR 82.
8. The guidance by the Court of Appeal in **Yerrakalva** held that costs should be limited to those 'reasonably and necessarily' incurred.
9. Awards of costs are intended to be compensatory not punitive: **Lodwick v Southwark London Borough Council** [2004] ICR 884.
10. The Tribunal is not confined to ordering a sum that a party is able to pay, or able to pay the moment an order falls to be made: **Arrowsmith v Nottingham Trent University** [2011] EWCA Civ 797 and **Vaughan**.

Background

11. By a claim presented on 27 December 2022, the claimant complained of sex discrimination and harassment related to sex.
12. Employment Judge Robertson conducted a preliminary hearing on 16 March 2023, when the claimant attended in person. At the hearing, the claimant indicated that she sought to complain in respect of a number of text messages that she had received from PM. She told Judge Robertson

she is unsure about the number and the date of these text messages. Judge Robertson in her case summary stated that it was agreed that the claimant would provide a complete copy of all the text messages upon which she wished to rely for the purposes of the claim, which include the dates, and incorporate that in an application to amend her claim. In her case summary, Judge Robertson indicated that the need to create a clear list of factual allegations in this case '*might mean discussing some matters which might feel uncomfortable.*'

13. A further hearing was conducted by Judge Smith to consider the application to amend. The hearing took place on 18 May 2023 in person. By then, the claimant had provided a list of dates of text messages about which she sought to complain. Judge Smith allowed the application relating to the text messages.
14. In his case summary, Judge Smith stated as follows "*the texts/Facebook messages, details of which are set out below will form part of the claimant's allegation of harassment, but the Tribunal will look at whether those texts forward/messages, taking in the appropriate context, demonstrated unwanted conduct rather than examining each individual text and making a determination in respect of each text*". We consider plain that what Judge Smith was saying that the text messages about which the claimant complained would be considered in their context and not individually.
15. Judge Smith made an order for disclosure in the standard terms, being the same terms as Judge Robertson had made i.e. "*documents includes recordings, emails, text messages, social media and other electronic information. You must send all relevant documents you have in your possession or control even if they do not support your case. A document is in your control if you could reasonably be expected to obtain a copy by asking somebody else for it.*" Disclosure was ordered to take place by 12 June 2023.
16. The claimant disclosed four documents via email on 19 June 2023, by way of disclosure. By 21 June, the claimant had disclosed 81 pages of Facebook messages, being only those that supported her claim.

Costs Warning Letter

17. On 21 June 2023, the respondent wrote to the claimant warning her of the respondent's intention to apply for costs in the event that the claimant continued with her claim in the event that she continued with her claim.
18. The respondent pointed out that it had disclosed to the claimant 1255 pages of Facebook messages between the claimant and PM. It stated that it believed that the claim was deliberately trying to conceal part of the conversation that did not serve the claimant's purpose.

19. The respondent set out nine dates on which exchanges took place and the exchanges themselves between the claimant and PM to underscore its point. Some of those text messages were relied upon by the Tribunal in its reasons.
20. The respondent continued that Having regard to the pleaded claim and the text messages, it believed that the tribunal would find that the claimant's claims were unfounded. It warned the claimant that if the matter went to a final hearing, the respondent would make an application for costs on the basis that the claimant had acted unreasonably in bringing the claim and that the claimant had no reasonable prospects of success.
21. The respondent informed the claimant that "*significant cost*" were already incurred in the proceedings but that if the claim was withdrawn by no later than 27 June 2023, the respondent would not pursue an application for costs.
22. The claim proceeded with her claim to a final hearing lasting 5 days.

The Final Hearing

23. The hearing took place over five days in September 2023. The claimant attended in person; the respondent by its counsel. Evidence was heard, submissions received and oral reasons were given the conclusion of the hearing, on 22 September 2023. The complains were dismissed. Written reasons were requested by the respondent.
24. The Tribunal made certain findings, as follows:
 - a. the claimant knew PM was besotted with her; the claimant was impressed by PM's wealth;
 - b. the claimant encouraged PM's feelings towards her;
 - c. the claimant's behaviour towards PM was transactional in nature -she allowed PM to believe that they were developing a personal relationship, knowing that he was bestowing gifts of significant value upon her in return;
 - d. PM's text messages to the claimant were an expression of genuine care, affection and love;
 - e. the claimant posited the idea of employment;
 - f. both parties recognise that the employment contract was created especially for the claimant, in relation to a job that was not required, and encapsulated in a document that bore little relation to any reality;
 - g. the claimant led PM to believe that employment would serve as a useful means by which to develop their personal relationship away from the gaze of her then partner, with the possibility of it becoming something more formal in the foreseeable future;

- h. the employment relationship was ancillary to the claimant's aims - she wanted the role to allow her to enjoy lifestyle she could not reasonably hope to achieve in any other employment;
- i. once the employment relationship commenced, there were no material changes in PM's behaviour towards the claimant and the claimant did not identify any credible instances either, despite being prompted by the Tribunal.

25. In summary, the Tribunal found the claimant manipulated PM into offering the claimant employment and continuing the contractual relationship, allowing him to believe that she was romantically interested in developing a relationship with him.

The Costs Applications

- 26. On 16 October 2023, that is after the provision of oral reasons, the respondent made an application for costs.
- 27. After the provision of written reasons, the respondent submitted, on 12 June 2024, supplementary grounds for its application.
- 28. In reply, the claimant made lengthy and detailed written submissions together with "points of objection" as one might receive a detailed assessment of costs.
- 29. Directions were sent to the parties on 22 May 2024, requiring, amongst other things the claimant to provide information and any supporting documentation in relation to her means by completing County Court Form EX140.

The Costs Hearing

- 30. At the hearing, both parties were represented by counsel; the claimant's counsel confirmed that the claimant did not seek to advance much of the contents of the claimant's document entitled 'points of objection'. Written submissions were received by both counsel. The claimant belatedly disclosed some documents relating to her means.

Discussion and Findings

Threshold Test

- 31. We begin with the question whether the claimant's conduct of the proceedings reached the threshold of having no reasonable prospects: rule 76(1)(b).

32. We accept that the threshold test is met. On the findings that we have made, it was unreasonable to bring, or continue the claim. The claimant had manipulated PM into offering her payment for employment that did not in reality exist, whilst prolonging his erroneous belief that this was being done as a ruse to deflect attention from the claimant's then partner, whilst she and PM developed their relationship. There was no material change in PM's behaviour after the employment relationship commenced; indeed, the claimant took the opportunity to go on trips with PM during the period she alleged she was being harassed by him.
33. Furthermore, we note that much of the evidence was documented in the form of text messages. Unless the claimant had a compelling explanation for why none of the extensive exchanges contained any reference, however oblique, to her rejection of PM's advances, her claim was significantly more likely than not to fail; the claimant did not seek to provide any detailed evidence of such instances in her written evidence, either. Whilst we note that the claimant was not legally represented, it was clear from the manner in which the claimant conducted these proceedings that she was a highly intelligent woman, with strong communication skills.
34. We conclude that the complaint of harassment related to sex had no prospects of successfully establishing that the claimant was being harassed; her counsel accepts that there was no reasonable prospects of the sex discrimination complaint being successful.
35. For similar reasons, we accept that the claimant was unreasonable in the bringing and the conducting of the proceedings – rule 76(1)(a).
36. In addition to our observations above, we add the following observations:
 - a. The text message exchanges were likely to be powerful contemporaneous evidence of the true nature of the relationship between the claimant and PM – indeed, that is why the claimant wished to rely on those texts in order to supported her allegations. Nevertheless, she knew, because Judge Smith explicitly stated, that the texts messages that she sought to rely upon would be construed in their full context; there would be no 'cherry picking';
 - b. The costs warning letter identified a number of text messages that undermined her allegations in order to illustrate why it believed the complaints would be rejected. The claimant made no response to the letter. We reject the claimant's contention that she believed the letter to amount to a ruse to dissuade her from proceeding with her claims; had she turned her mind to its content, she would have appreciated that the examples of texts contained in that letter amounted to compelling evidence that she was complicit in PM's understanding that the employment relationship was a 'cover' to allow them to conduct a relationship with a view to developing it further in the foreseeable future;

- c. By insisting on proceed to a final hearing, the claimant effectively compelled PM to be subjected to public scrutiny about matters that she knew, or at least ought reasonably to have known, were likely to be difficult and embarrassing for him.

37. We have had regard to the fact that the claimant was unrepresented and might therefore lack the objectivity required when pursuing a claim, but we remind ourselves that we found that the claimant was a highly intelligent individual with an eye for detail. The claimant was informed in explicit terms by Judge Smith that the texts upon which she relied would be viewed in context; the respondent disclosed several volumes of files containing the entirety of the exchanges. The costs warning letter identified texts which illustrated the dynamic between herself and PM, and to which the claimant had no response to the letter, or any significant in her written or oral evidence, other than repeating her assertion that the conduct complained about was unwanted. We conclude that the threshold is crossed was because of any lack of appreciation on the claimant's part of the merits of her claim, but because of her refusal to engage with the compelling evidence undermining her case.

Exercise of Discretion / Costs Order

38. We move on then to the second issue, which is whether we should exercise our discretion to make a costs order and if so, in what amount.
39. We reject the claimant's submission that her decision to proceed to a final hearing was justified because she was entitled to be believed that she was subject to harassment. We found that she was not only not subject to harassment, but that she actively encouraged, developed and prolonged the relationship in her own financial interests.
40. We have found above that her claim that the costs warning letter was something that she believed to simply be an attempt to strongarm her into abandoning her claim as being unsustainable, when the letter is properly examined.
41. Had she gone about matters sensibly she would have appreciated that the texts upon which she relied would be viewed in the context of volumes of contemporaneous exchanges in which she could identify no reference, however, oblique, to any resistance on her part, but rather the overwhelming evidence supported her active engagement in the relationship. She would have, had she turned her mind to it, understood that she was unable to explain her own text messages and actions with little more than a bare assertion that PM's conduct towards her was unwanted.
42. Her decision to proceed to a final hearing required the respondent to defend proceedings and incur the cost of doing so. She knew, or at the very least, ought reasonably to have known, that the only realistic hope of successfully

defending the proceedings was to subject PM's actions to detailed scrutiny at a public hearing, when she knew, or at the very least ought reasonably to have appreciated that his actions were borne of his naivete coupled with false hope in a non-existent relationship that the claimant had actively encouraged. We find that, at best, that her action in proceeding to a final hearing was done with reckless disregard to the expense she knew she was causing the respondent to incur.

43. We are satisfied that it is appropriate to exercise our discretion to make a costs order in favour of the respondent and that to do so is in accordance with the overriding objective.
44. We have considered the claimant's means. We are not required to claimant's ability to pay a costs order into account, but we do, on the limited basis that follows.
45. There was limited and selective disclosure before us relating to the claimant's means; she did not disclose the source of any income, or the balance in her bank accounts or any savings.
46. We take into account further information that the claimant's information at page 291 – produced without supporting documents, in which she contends that her outgoings are £1586.23 per month, and that her income is £1778.45 per month although she claimed to be unemployed. She said she was due to start a new job on 24 June 2024 on an income of £27,500.
47. As well a property that she has a share in and in which she resides with her current partner, she and her partner own an investment property, the value of which is said to be £180,000 subject to a mortgage of £135,000 giving an equity of £45,000. Of that equity, the first £35,000 of which belongs to the claimant exclusively, pursuant to an agreement between herself and her current partner. In addition, it generates a rental income of £9,600 pa gross.
48. The respondent's costs are said to total £32,000, but it is prepared to restrict its application to £20,000 so that they may be subject to summary assessment. Given our findings that the claim had no reasonable prospects of the outset and should not have been brought or proceeded with, we have no difficulty finding that £20,000 was reasonably and necessarily incurred in defending the claim. The documentary evidence was substantial and the witness evidence detailed, taking 5 days to consider. We have debated at length whether to make an order in the full sum claimed, but concluded that the costs warning letter did not indicate the scale of the costs being incurred; had it done so, we may have been prepared to make an order in the full amount sought.

49. In the circumstances, and reminding ourselves that a costs order is compensatory in nature and not punitive, and having regard to such information about the claimant's means, as she has chosen to provide, we make an order that the claimant pays the respondent £15,000, being a sum that we are satisfied that the claimant will be able to meet within a reasonable timeframe.

Employment Judge Jeram

Date: 20 December 2024