EMPLOYMENT TRIBUNALS

Claimant: Angel Mirembe

First Respondent: BlackLion Law t/a ClaimLion Law
Second Respondent: Ms Kim Fenton

Heard at: Watford Employment Tribunal **On**: 21 February 2025

Before: Employment Judge Young

Members: Ms A Telfer
Mrs S Boot

Representation
Claimant: Did not attend
Respondent: Ms Negar Yazdani (Solicitor)

COSTS JUDGMENT

JUDGMENT of Employment Judge Young having been sent to the parties on 28 February 2025 and written reasons having been requested on 10 March 2025 by the Claimant in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. Ms Negar Yazdani attended on behalf of the First Respondent and the Second Respondent. The Claimant did not attend. The Claimant had been given notice of the hearing since December 2024. The Claimant had failed to attend the hearing. The Claimant was contacted on the morning of the hearing and the clerk left voicemail messages informing her that the hearing was to go ahead. The Claimant did not respond to those messages.

2. We were provided with the First Respondent's written submissions, legal authorities, schedule of costs of the First Respondent, history of the cost warning, Ms Yazdani's oral submissions and Mrs Fenton's (the Second Respondent) schedule of costs in relation to her Preparation Time Order ('PTO') all of which we considered.

The relevant law on Costs & Preparation Time Orders

3. In the Employment Tribunal Procedure Rules, the section on Costs Orders and Preparation Time Orders is contained in rules 72 to 82 of The Employment Tribunal Procedure Rules 2024 ('ETPR'). Rule 74 deals with when a costs order may or should be made. Rule 74 states:

"74.—(1) The Tribunal may make a costs order or a preparation time order (as appropriate) on its own initiative or on the application of a party or, in respect of a costs order under rule 73(1)(b), a witness who has attended or has been ordered to attend to give oral evidence at a hearing.

(2) The Tribunal must consider making a costs order or a preparation time order 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 of it, or the way that the proceedings, or part of it, have been conducted,

(b) any claim, response or reply had no reasonable prospect of success, or

(c) a hearing has been postponed or adjourned on the application of a party made less than 7 days before the date on which that hearing begins.

(3) The Tribunal may also make a costs order or a preparation time order (as appropriate) on the application of a party where a party has been in breach of any order, rule or practice direction or where a hearing has been postponed or adjourned…."

4. When an application for costs is made, the Employment Tribunal should follow through three stages to make the decision. The first stage being has one (or more) of the criteria (for costs to potentially be awarded) as set out in the rules been met. In this particular case the Respondents rely upon rule 74(2) (a) and rule 74(2) (b). If there is no criteria in the rules that is met, there can be no order for costs. But if there is criteria that is met, the Employment Tribunal must identify which rule or rules contain the criteria which have been satisfied (and why)? The Employment Tribunal must ask if the rule that is met is one which requires the Tribunal to consider making an award or is it one which says the Tribunal "may" consider making an award. Either way, if the criteria for a costs order are met, that means that the Tribunal has discretion to make an award, but it is not obliged to. Then the Employment Tribunal should identify what are the relevant factors to be taken into consideration in the case, and, taking into account all of the relevant factors (and ignoring anything which is irrelevant), ask itself should an award be made.

5. If the Employment Tribunal decides that an award is to be made, then the question is what is the amount of the award? (And what is the time for payment, etc).

6. Where the argument is that the party has acted "vexatiously, abusively, disruptively or otherwise unreasonably" then the only conduct that is taken into account is that which is (either the bringing of the proceedings or) the way that the litigation has been conducted. The conduct in question will be relevant to whether the criteria in Rule 74(2)(a) is met and/or whether, in all the circumstances, the Tribunal should exercise its discretion to make a costs order.

7. 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. Simply being 'misguided' is not sufficient to establish vexatious conduct (See AQ Ltd v Holden [2012] IRLR 648, EAT)

8. Costs are the exception rather than the rule (see Yerrakalva v Barnsley [2011] EWCA Civ 1255). Thus the mere fact alone that the criteria under the rules have been met does not establish that there is a general rule that an Employment Tribunal is to make a costs order in such circumstances.

9. Costs, if awarded, must be compensatory, not punitive. If the argument that there has been unreasonable conduct is made, then the whole picture of what happened in the case is potentially relevant. The Court of Appeal in McPherson v BNP Paribas (London Branch) 2004 ICR 1398, CA suggests that Employment Tribunals should have regard to the nature, gravity, and effect' of a party's unreasonable conduct. However, it is necessary to identify the specific conduct, and decide what, specifically, was unreasonable about it and analyse what effects it had. Some causal link between the conduct and the costs sought by the other party is required. (See Yerrakalva v Barnsley).

10. The fact that a costs warning was made, even one which is clear, detailed, and well-timed, and which identifies the precise basis on which the application was later made, does not guarantee that an order will be made.

11. A relevant factor is what advice did the party have? And from whom? When was the advice given? It can be a double-edged sword that a party has taken legal advice. If they seek to argue that since a lawyer advised them that the claim had merit, it was not unreasonable to pursue it, in all likelihood they will have to waive privilege over the legal advice to make such an argument. On the other hand, the opposing party might seek to argue that the fact that the paying party had legal advice available shows that they ought to have understood the claim was hopeless, and/or that their conduct was inappropriate, and/or that a settlement offer that had been made was a good one. However, there is no requirement to do so to defend itself against the latter inference; where privilege is not waived, the Tribunal will not make assumptions that the party specifically received advice that they were acting unreasonably, but the fact that advice was available to them is likely to undermine an argument that, as a litigant in person, they could not reasonably have been expected to anticipate the arguments being raised by the costs application.

12. Rule 82 ETPR states:

"Ability to pay

In deciding whether to make a costs, preparation time, or wasted costs order, and if so in what amount, the Tribunal may have regard to the paying party's (or, where a wasted costs order is made, the representative's) ability to pay."

13. As per rule 82 "ability to pay" is something that "may" be taken into account at each of the last two stages of the decision-making. That is: should an award be made at all; if so, what is the size of the award (and the timetable for payment). The Tribunal is not obliged to take "ability to pay" into account but should specify whether it has done so or not (and, if not, why not). Generally speaking, where a party wants the Tribunal to decide that they do not have the ability to pay, then the onus is on them to firstly raise the point and then provide evidence to back up the argument.

Analysis and Conclusion

14. The Claimant had been given notice of the hearing since December 2024. The Claimant had failed to attend the hearing or respond to messages from the Employment Tribunal on the morning of the hearing to attend. The Claimant was given an opportunity to provide documentation as to her means in writing that would be shared with the Respondent. The Claimant did not provide any such documentation. We consider that the Claimant's failure to attend the costs hearing or give any explanation for her absence as unreasonable conduct and we take this into account in respect of our decision on costs.

15. Whilst we had no information or evidence as to the legal advice that the Claimant had, and it is the case that the Claimant was not represented at any time by a legally qualified person, the Claimant told us in evidence at the merits hearing that she has a law degree and did the SQE in 2021, but she dropped out. The Claimant told us in evidence that she did SQE 1 but did not do SQE 2 and started the barrister course in September 2023. However, she confirmed that she did not pass that. The Claimant confirmed that as part of SQE 1, there was no employment law module, and she only has experience in commercial work as a Paralegal.

16. However, we considered that the Claimant did work in the legal arena and had access to legal resources as she was doing the Bar course at the time she was preparing her case. She could have looked up the law surrounding her claim. The Claimant had the means to access legal advice to assess the merits of her claim, which in relation to her wrongful dismissal claim was on any analysis hopeless.

17. We found that the Claimant was dishonest and knew that she was being dishonest. The Claimant knew she had a hopeless claim in this respect. The Claimant's claims against Ms Fenton stemmed from her involvement in writing the letter of dismissal to the Claimant. We conclude that it was utterly unreasonable for the Claimant to have named Ms Fenton as a Respondent when she knew she was being dishonest.

18. We are sympathetic to the First Respondent's argument that in respect of the complaint of discrimination the Claimant had not raised a complaint of

discrimination until her dismissal and therefore knew that her race discrimination and victimisation complaints had no reasonable prospects of success. However, we did not make a finding that the Claimant was not genuine in the merits hearing, but we do conclude now that based upon the Claimant's legal background she had access to and should have known about the lack of merit of her race discrimination & victimisation claims. The Claimant did not offer any evidence of race other than the difference in race in respect of her discrimination claim. The Claimant had worked for the Respondent before and had never complained of race discrimination and had gone back to work for the Respondent. The Claimant did not offer any explanation why she brought her some of her claims so late either. The Claimant should have known that her claims had no reasonable prospects of success, and the Claimant behaved unreasonably in pursuing all her claims.

19. The Claimant asked for £50,000 in compensation on her claim form. Her monthly net salary was £1,437 with the First Respondent. We heard evidence from Ms Yazdani today that she told the ACAS officer around October 2021 before the Claim form was issued that *"she was seeking a high amount which she refused, she told ACAS that the first Respondent was rejecting her offer and she needed to act reasonably as there is absolutely no merit to her claim, and if she continued down this path, the Respondent is happy to go to the Employment Tribunal and will seek all their legal costs and to tell the Claimant that*". Whilst we accept Ms Yazdani's evidence that she told this to the ACAS officer we do not have any evidence that the ACAS officer told the Claimant, and so we cannot take it into consideration as to the number of warnings the Claimant had.

20. The Claimant behaved unreasonably in turning down an offer of £2,000 on 2 January 2024 made on 22 December 2023 which was initially for 7 days and then extended to 4 January 2024. The offer of £2,000 was more than reasonable when the Claimant knew that her wrongful dismissal claim had no reasonable prospect of success because we found that the Claimant knew she was dishonest as to why she was being dismissed. The Claimant's notice period was 1 month. Kopel v Safeways Stores PLC 2003 IRLR 753 EAT, permits Employment Tribunals to take into consideration the fact that the Claimant rejected the reasonable offer made.

21. The Claimant was unrealistic putting forward a counter offer of £22,000 on 2 January 2024. Ms Yazdani told the Employment Tribunal in submissions the offer of £2,000 was offered on a commercial basis and not because the Claimant's claim had reasonable prospect of success. We accept that submission and take into account the repeated nature of the warnings and the gravity of the Claimant's unreasonable behaviour bringing a claim (wrongful dismissal) which she knew to be hopeless and misconceived.

22. Having considered whether the threshold was reached in respect of rule 74 (2) (a) & (b) in whether to make a costs or PTO order we now consider whether to make an order for costs and or a PTO? We have decided to make orders for costs and a PTO based upon the Claimant's unreasonable conduct in relation to both the First Respondent and Second Respondent and the fact that the claims had no reasonable prospect of success.

23. We would not go so far as to say the Claimant was vexatious as we did not have any evidence of an improper motive by the Claimant.

24. The Claimant was given every opportunity to put forward evidence in relation to her personal means. The Employment Tribunal wrote to the Claimant asking her to respond by 15 May 2024, the Claimant did not respond. In the circumstances considering our discretion as to the amount of the costs and PTO, the Claimant's means were not taken into account as the Employment Tribunal had no recent evidence from the Claimant in order to do this.

25. Having considered Yerrakalva, we considered the First Respondent schedule of costs was reasonably and necessarily incurred from the date of the costs warning on 23 December 2023.

26. Ms Yazdani's submissions to us were that the First Respondent only wanted the Employment Tribunal to consider the First Respondent's costs up to £20,000. We considered only awarding costs from the date of the costs warning; however, it made no difference to the total schedule of costs as it only reduced the costs by £3030. We have decided that the Claimant should have known from the start that her claim was misconceived and had no reasonable prospect of success. The costs were limited to £20,000 in any event. Ms Yazdani accepted in submissions that the application for an adjournment had nothing to do with the Claimant so should be deducted from the First Respondent's schedule of costs amounting to £345. Taking a holistic approach we award costs on a compensatory basis of £19,655 to be paid within 14 days.

27. In respect of the PTO we considered the Second Respondent's schedule of costs and concluded that it was reasonable for the Second Respondent to spend 4 hours on the response form at a rate of £41 per hour in 2022 which is £164.00 in total. In respect of 4 hours of preparation for the preliminary hearing in June 2022, the rate was £42.00 per hour. The total therefore amounts to £168. In respect of attending the hearing in 2024, £43 is the rate at that time and the Second Respondent attended the hearing for 12 hours. The total for attendance at the hearing is £516. Overall the total award in respect of the PTO is £848.00 to be paid to the Second Respondent within 14 days.

28. We suggested to the First Respondent that they propose a schedule of payment to the Claimant. Ms Yazdani said that the First Respondent would take a sensible approach.

Approved By:

Employment Judge Young

Dated 16 March 2025

REASONS SENT TO THE PARTIES ON

17 March 2025

FOR THE TRIBUNAL OFFICE

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