EMPLOYMENT TRIBUNALS

Claimant: Miss L Boiko

Respondent: Flamingo Flowers Limited

Heard at: Nottingham **On:** Monday 3 April 2017

Before: Employment Judge Blackwell

Members: Mrs G K Howdie
Mr D J O'Dowd

JUDGMENT ON COSTS

The unanimous decision of the Tribunal is that pursuant to Rules 75 and 76 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Schedule 1, the Claimant is ordered to pay to the Respondent's the sum of £583.00.

REASONS

Issues and the Law

1. By an application of 1 November 2016 the Respondent's solicitors applied for an order that the Claimant pay costs of £583.00. The relevant provision is Rule 76 of the above mentioned Schedule 1:-

> "(1) Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that:
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> > (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."

2. In summary at paragraph 4 of their application the Respondent's say:

> "It is an abuse of the Tribunal process not to agree the amount conveyed to the Claimant, but to use the remedy hearing as leverage to settle a potential personal injury claim, in particular in the light of the Tribunal's clear direction that the parties should seek to agree the figures: In contrast to the Tribunal's clear instructions there was no attempt to bind the Claimant to agree the figures.

(b) it was unreasonable conduct to reject an offer from the Respondent that reflected the amount calculated as per the amount ultimately awarded by the Tribunal."

History

3. By a reserved judgment of 6 July 2016 the Tribunal dismissed Ms Boiko's claims of disability discrimination but found that her claim of unfair dismissal succeeded. The judgment at paragraph 3(a) read as follows:

"Therefore Ms Boiko is entitled to:-

(a) A basic award pursuant to Section 119 of the Employment Rights Act 1996 which is to be calculated as follows:-

9 being the number of years continuous employment times 1½ given that Ms Boiko was above the age of 41 at all relevant times, times the gross amount of a week's pay.

(b) It would be just and equitable to limit the compensatory award to an amount equivalent to 3 weeks' net pay being the period within which a fair procedure would have taken place."

4. At paragraphs 15 and 16 the reserved decision went on:

"15. Thus by way of remedy, although we appreciate that we have heard no evidence or submissions on the point, it is plain that Ms Boiko is entitled to a basic award calculated in accordance with Section 119 of the Employment Rights Act. We have found that Ms Boiko has 9 completed years of continuous employment and that she was at all times above the age of 41. We have heard no evidence as to her weekly pay but trust that that is a matter that can be agreed between the parties.

16. As to the compensatory award; in accordance with Section 123 of the 1996 Act, it is our view that it should be limited to the period during which a fair procedure would have been carried out. We are of the view that that period would be 3 weeks. It therefore follows that the compensatory award is limited to 3 weeks' net wages. Again we have heard no evidence on this point but trust that agreement can be reached."

5. There then followed correspondence between the Respondent's solicitors and the Claimant. In short the Respondent's solicitors attempted to agree both the basic award and the compensatory award. Agreement was not reached. Ms Boiko's responses appeared to be a re-run of the case she had brought of unfair dismissal and disability discrimination.

6. We should note that throughout the 3 days of the main hearing we had repeatedly to tell Ms Boiko that the Tribunal's jurisdiction was limited to her claims of unfair dismissal and disability discrimination. That was because she constantly alleged that the medical conditions which led to her dismissal had been caused by the negligence of her employer. She returned again and again to that point both during the hearing and in the voluminous correspondence conducted both before and after her dismissal.

7. Accordingly since no agreement was reached a remedy hearing was arranged and since it is brief, that judgment is set out below:

The unanimous decision of the Tribunal is:-

1. The basic award payable under Section 119 of the Employment Rights Act is calculated as follows:-

1.1 9 years continuous service times 1½ given Ms Boiko's age times a weekly pay of £279.50 equals £3,773.25.

1.2 The compensatory award is limited to 3 weeks' sick pay at the rate of £88.45 giving a total of £265.35.

2. The Respondent's are ordered in total to pay to the Claimant the sum of £4,038.60."

8. Unsurprisingly Mr McBride on behalf of the Respondent's made the application for costs of 1 November to which we have referred above. The Tribunal then asked the Claimant to comment on the application of 1 November. By this time Ms Boiko was being represented by her daughter. She was asked by the Tribunal in a letter of 3 January 2017:

"You are also asked to comment on the Respondent's solicitor's application of 1 November 2016, a copy of which you already have. You are strongly advised to seek the advice of the solicitor you refer to in your correspondence."

9. Ms Victoria Boiko responded on 23 January as follows:

"However I disagree with Mr McBride's claim of £583.00 to recover costs and be deducted from my mother's reward on the basis that she didn't attend the remedy hearing and behaved unreasonably.

I base my claim upon Mr McBride's letter dated 1 November 2016, page 3.3(a)(ii) where clearly my mother at the time was in correspondence with the solicitor to gain legal advice and backup for the remedy hearing. However as the time went on and no response had been made directly from the Tribunal she wasn't able to keep in contact with the solicitor."

10. On 25 January 2017 the Tribunal acknowledged that letter and went on:

"Employment Judge Blackwell asked whether the parties agree that the application for costs dated 1 November 2016 be determined without a hearing on the basis of that document and the Claimant's response of 23 January 2016. Please reply by 1 February 2017."

11. The Respondent's solicitors by e-mail of 25 January agreed that the application be determined without a hearing. There was no response from the Claimant or her daughter.

12. Accordingly we have now to decide on the Respondent's application.

13. As we made clear the only matter for agreement was the amount of Ms Boiko's weekly pay. As was set out in paragraph 3 of the remedy judgment, Ms Boiko had already set out that figure and the Respondent's agreed that it was correct ie £279.50.

14. It seems to us self evident that it was unreasonable of Ms Boiko not to concede that point.

15. That however is not the end of the matter. We still have a discretion to award or not to award costs even where the Claimant's behaviour has been plainly unreasonable. In so doing we have taken into account the following matters:-

(a) The Claimant's ability to pay, which is a matter that we may have regard to in accordance with Rule 84. It was clear at the time of the decision on liability that the Claimant was ever likely to work again. We have therefore assumed that her only income will be the relevant disability allowance. We also have regard to the fact that she has either received the award ordered by the remedy judgment, namely £4,038.60 or will receive that sum.

(b) We have also taken into account the fact that Ms Boiko's English is extremely poor.

(c) The fact that in recent correspondence, not relevant to the costs issue, Ms Boiko is still persisting in pursuing with the Tribunal a claim that her current medical condition was caused by her employer.

On balance we feel that it would be right to make an award in this case. Ms Boiko has turned her face against any communication with which she does not agree. The Respondent has been put to completely unnecessary expenditure and we therefore award the sum requested in the application of 1 November which involves 2 hours and 12 minutes of Mr McBride's work at the hourly rate of £265.00 per hour. We would comment that Mr McBride appears to have kept the application to an absolute minimum. For example he has made no claim for travelling time to and from the remedies hearing.

The decision therefore is that the Claimant must pay to the Respondent's by way of costs, the sum of £583.00.

Employment Judge Blackwell

Date 15th May 2017

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE