EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms I Smolarek	**v**	**(1) Tewin Bury Farm Limited** **(2) Mr Wojciech Bobrowski**

Heard at: Watford **On**: 16 July 2018

Before: Employment Judge R Lewis
Mrs J Smith
Mr C Surrey

Appearances

For the Claimant: Mr Thomas Klarecki, Friend
For the Respondent: Mr Mark Stephens, Counsel

JUDGMENT

The claimant is ordered to pay to the respondent costs of £6,320.00, credit to be given for sums already paid.

REASONS

1. Mr Klarecki asked for written reasons after judgment had been given.

Background

2. This was the hearing of the respondents' costs application.

3. A brief summary is that following a six-day hearing in June 2015 before Employment Judge Southam and the present non-legal members the claimant's claims were dismissed and she was ordered to pay costs of £5,200.00.

4. By judgment of the EAT given on 5 July 2017 the costs order was set aside and remitted to the same tribunal.

5. As Judge Southam had retired, the present Judge was appointed in his place. He conducted a case management hearing on 19 October 2017 and the order of 1 November which followed should be read with this. The

hearing was that day listed for 18 May 2018 but could not proceed in circumstances set out below. The present hearing was listed on 18 May.

Procedure at this hearing

6. The respondents were represented throughout by Mr Stephens. The claimant was represented by Mr Klarecki, who had represented her throughout the 2015 hearing, and in October 2017 and May 2018. She was assisted by a Polish language Interpreter.

7. The tribunal had a respondents' bundle; the judgments of the Southam tribunal and of the EAT; a document entitled "Why Are We Here?" prepared for this hearing by Mr Klarecki; an email from Mr Klarecki sent at 23:02 on 21 June 2018, setting out the claimant's means; a further bundle of correspondence around the May 2018 hearing; and an extract on "Ability to Pay" from Harvey.

8. The procedure which was followed was that Mr Stephens made his application, following which the tribunal broke for twenty minutes and Mr Klarecki replied. That took us to the lunch break, after which we gave judgment in the sum of £6,000.00. After we had given that judgment, Mr Stephens made a further application based on correspondence marked "Without prejudice save as to costs." Mr Klarecki replied and after deliberation we gave judgment in the further sum of £320.00.

9. The tribunal met on the basis that all findings of fact, and the factual conclusions as to unreasonable conduct by the claimant set out in the Southam judgment were undisturbed by the EAT, and were therefore binding upon us. (This had been explained to the claimant and Mr Klarecki at the October 2017 hearing, and confirmed in the order which followed).

The legal framework

10. This application was made under Rules 74-84 of the Employment Tribunals Constitution and Rules of Procedure Regulations 2013. Rule 76 states:

> "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… 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… had no reasonable prospect of success."

11. Rule 78(1) empowers the tribunal to order the paying party to pay "a specified amount, not exceeding £20,000.00."

12. Rule 84 provides that: "In deciding whether to make a costs… order, and if so in what amount, the tribunal may have regard to the paying party's… ability to pay."

13. Tribunals approach the matter on the basis of three stages. At the first stage, we consider whether the requirements of Rule 76(1) have been met, and if not, the application for costs must fail; the second stage is to consider

whether it is in the interests of justice to make an award of costs; and at the third stage, the tribunal decides how much to award, or how the award should be expressed. As has previously been clarified, our task in this case was limited to reaching a conclusion on the third stage only.

Mr Stephens' submissions

14. Mr Stephens submitted that the tribunal should be aware, for purposes of calculating amount, that the claim had been conducted unreasonably at every stage. He drew to our attention correspondence between Mr Hornsby, his instructing solicitor, and Mr Klarecki, in which Mr Klarecki had expressed himself in a manner which if not openly abusive, was little to Mr Klarecki's credit.

15. Mr Stephens then dealt with the actual amount of the respondents' costs of defending this matter, which he placed in excess of £30,000.00 including VAT.

16. He then turned to the information about the claimant's ability to pay. The pointed out to the tribunal that as the claimant was undergoing NVQ Level 4 qualification and training, it was likely that her income would increase, and that her ability to pay would develop with the passage of time.

17. He submitted with reference to the claimant's email of 21 June 2018 that the claimant had provided inadequate information about her means. It was clear that the claimant had simply provided a list of headings and figures, unsupported by any form of verification such as payslips, bank statements, receipts or the like.

18. Mr Stephens confirmed that he asked the tribunal to look afresh at the costs, and that it was not bound by the figure of £5,200.00. He said that he was putting the application on a broader basis than had been put to the Southam tribunal.

19. He also applied for an order for the costs wasted by the hearing on 18 May, which we deal with separately below.

Mr Klarecki's reply

20. Mr Klarecki in reply made the following main points.

21. He submitted first that there had been a preliminary hearing before Employment Judge Smail on 10 April 2015 at which the respondents' application for strike or deposit orders had been refused. As a result, he argued, the claimant had an honest believe that her claim was legitimate and it was therefore untrue to say that the claim was in any respect unreasonable.

22. Mr Klarecki's second point referred to the judgment of the Supreme Court in R v Lord Chancellor on the application of Unison 2017 UKSC 51 (the ET fees case). Relying upon his interpretation of remarks made by the Supreme Court he submitted that costs awards in general constituted an

unreasonable unconstitutional barrier to access to justice, which could not lawfully be imposed. He quoted a sentence from paragraph 114 of the Supreme Court judgment which appeared to support this proposition; but which in context proved to be a quotation from a judgment of the ECHR in a case about a particular costs procedure in the courts of Bulgaria.

23. Thirdly, Mr Klarecki submitted that the claimant was "really afraid" even to contemplate becoming involved in a court or employment tribunal again, which therefore indicated that the costs jurisdiction had been exercised in such a way as to constitute a real impediment to access to justice.

24. He submitted fourthly that the Southam costs award was disproportionate, and criticised the respondents for their engagement of legal representatives, the costs which they had incurred, and submitted that their defence of the primary claim, and their pursuit of the present matters, constituted 'a vendetta' and 'psychological bullying'.

25. He agreed that the email of 21 June 2018 did not attach documentation about the claimant's means, but submitted that all information in it was true and was given as ordered by the tribunal in October 2017.

Discussion and conclusions

26. We remind ourselves first that at paragraphs 60, 66 and 67 in particular, the Southam tribunal found that the litigation had been conducted unreasonably because it was unfocused and overloaded, because the claimant had failed to deliver on her undertaking to Judge Smail to produce a schedule of her ten best points, and that she had, by her failure properly to analyse her claim, failed to address the issues which she wished to raise, as summarised in paragraphs 66 and 67.

27. We consider that we are fully bound by the Southam findings on unreasonableness, and that it is not open to us to amplify them as Mr Stephens asked us to, or to make findings of unreasonableness against the respondents, as Mr Klarecki asked us to.

28. We do not agree that Mr Klarecki's correspondence with Mr Hornsby, no matter how open to criticism, crossed the threshold of unreasonable conduct.

29. Mr Stephens also referred us to a costs warning letter sent by the respondents, in which the claimant was offered a 'drop hands' deal as early as 12 February 2015. Although we can see that that was a sensible offer, we decline to make a finding, with the benefit of years of hindsight, that its rejection at that time was unreasonable.

30. We reject Mr Klarecki's points. Judge Smail's decision not to strike out or order deposits was not a ruling that the claim and its conduct were not unreasonable. It was a ruling that the claim as presented to him on a certain day did not meet the tests of Rule 37 or 39. It was in any event

made before the claimant had agreed to summarise her ten best points and had then unreasonably failed to do so.

31. Mr Klarecki's references to the Supreme Court were misplaced. The Unison judgment concerned the fees imposed on by the state as a condition of access to the system of justice. The case did not engage discussion of the rules of procedures between parties. The logic of Mr Klarecki's submission was that any costs award of any substance in any jurisdiction was unlawful and unconstitutional. That plainly could not be right.

32. We attach no weight to being told that the claimant was "really afraid" of further litigation. We must approach this matter objectively and without regard to the claimant's subjective feelings. We add that in light of the much reported increase in the number of employment tribunal cases in the last year, we have no reason to believe that the public is afraid of accessing the employment tribunal system.

33. We reject Mr Klarecki's submission on proportionality. The respondents were entitled to defend themselves against serious allegations and to instruct lawyers to do so. Once they had done so, the litigation process involved the management of conflict. The Second Respondent, as a personal party to the proceedings, was on equal footing with the claimant and had the same rights to fair process as she did. The non-legal members told the Judge that when judgment was delivered by Judge Southam, and the Second Respondent was wholly vindicated of the allegations against him, he became visibly distressed.

34. The information about means given by the claimant was plainly not complete, not supported by a single independent document, and was insufficient to enable the tribunal to take a rounded measured view of her ability to meet an award of costs. In particular, most strikingly it omitted her commitment to pay costs of £160.00 per month, in accordance with an Attachment of Earnings Order. The use of that procedure indicates some form of scientific analysis by the County Court of the claimant's income and outgoings.

35. We likewise attach no weigh to Mr Stephens' submission that the claimant's future prospects of employment might increase, because of two factors which seem to us imponderable, namely the impact in the job market of the claimant's limited English language skills, and the future impact, if any, of Brexit.

36. A further particular difficulty in the exercise of our discretion has been that the tribunal has at no point had any direct communication with the claimant. She was not called upon to speak at this hearing, and she gave evidence in 2015 through interpreter. The tribunal noted that Mr Klarecki wrote in the claimant's name from his own email account, but the tribunal has no means of knowing whether Mr Klarecki fully and accurately translated correspondence to her, and faithfully carried out her instructions in replying.

37. A related difficulty was that Mr Klarecki did not have the understanding of the law, procedure or systems of the tribunal which would have enabled him to do justice to the case which he sought to present. While we recognise that liability for default of a representative must fall on the party, that factor as an element in fairness troubled us in particular in this case, involving a claimant and representative who were both lay people and both accessing the tribunal in a second or third language.

38. It seems to us right to award an affordable sum, which properly compensates the respondents for their costs, and which marks the unreasonableness of the claimant's conduct. Accepting the accuracy of her assertion that she takes home £1,500.00 per month net, and bearing in mind that her ability to pay has already been demonstrated by monthly payments, it seemed to us that the correct figure is £6,000.00. We were told that the claimant has already made about nineteen payments of £160.00 each. For complete avoidance of doubt, we add that credit is to be given for all sums already paid pursuant to judge Southam's order, and that our award is not in addition to sums already paid.

Costs of 18 May 2018

39. Mr Stephens applied further, as a discrete matter, for the costs wasted by the adjournment of the hearing on 18 May 2018. Notice of that hearing was given on 25 January 2018. Late on Monday 14 May, Mr Klarecki wrote to the tribunal to say (so far as material):

> 'The claimant respectfully applies for permission not to attend the hearing of 18/05/2018. The claimant suffers from overwhelming stress and anxiety when confronted with the thought of attending the hearing. Mr Klarecki, the claimant's representative, will be present at the hearing. Mr Klarecki is in possession of all the information ..'

40. Although he had by then been engaged in tribunal procedures for several years, Mr Klarecki failed to comply with rule 92, and did not copy his email to the respondent's solicitor, or say that he had done so.

41. The email was referred to the present judge on Thursday 17 May, the day before the listed hearing. He did not read it as a literal request for permission, but as communication of a decision not to attend, and a request for information about the consequences. He therefore directed a reply to be sent to the parties as follows:

> 'The hearing .. will proceed in the claimant's absence. The interpreter will be cancelled.'

42. At 17.22 that afternoon, Mr Klarecki replied to the tribunal, again not copied to the respondent, to say,

> 'Please do not cancel the interpreter as the claimant's representative, Mr Klarecki, needs one too. The claimant will be present at the Tribunal at 10am to agree with the Judge if her attendance is need or not. '

43. The claimant attended the tribunal on the morning of 18 May, apparently to ask for permission not to attend. She remained throughout the working day. The hearing therefore could not proceed in the absence of an independent interpreter. (The tribunal rejected Mr Klarecki's alternative application, which was for a Polish language interpreter to assist him in the light of his hearing loss).

44. We accept that the need to adjourn could have been avoided if Mr Klarecki had not left his request late, and / or if he had copied it to the respondent; and / or if the claimant had carried out her intention of absenting herself from the hearing. Mr Klarecki's requests on 17 and 18 May for a Polish interpreter conveyed the impression of an opportunistic attempt to cause delay.

45. We found that that there was some ambiguity in Mr Klarecki's email of 14 May, and we accept that the judge may have misunderstood it. It seemed to us right therefore to give the benefit of the doubt to a lay person reading and writing in a foreign language. We therefore made no discrete order for costs in respect of the 18 May hearing.

Costs from without prejudice correspondence

46. After we had given the above judgment, Mr Stephens showed us an email of 16 March 2017 (*sic*) in which the respondents stated that the claimant had made her first two payments of £160.00 per month, and that they would accept payment of £2,000.00 in another fourteen days in full settlement to conclude matters. The tribunal file suggested that the significance of that date was that on 13 March 2017 notice of hearing in the EAT had been sent, the claimant having overcome the Rule 3(10) procedure the previous month.

47. No reply was sent on behalf of the claimant until 17:22 hours on Thursday 17 May 2018, fourteen months later and therefore around close of business on the afternoon before the listed hearing in this tribunal, when Mr Klarecki wrote on the claimant's behalf to say that she would accept that proposal, provided the respondents would repay the excess over £2,320. In reply to being asked why the claimant had not accepted the proposal of £2,320 earlier, Mr Klarecki said that she did not have that amount of money in March 2017 and it was a case of "better late than never." When pressed by the tribunal as to whether he accepted that the respondents must already have incurred all the costs of preparing by the afternoon of 17 May 2018, Mr Klarecki avoided the question.

48. The tribunal bore in mind the possibility that this correspondence had been conducted entirely by Mr Klarecki without instructions from the claimant. We repeat the points made at paragraphs 36-37 above.

49. It seemed to us that the offer made in March 2017 was one which should have been accepted, and that the proper response would have been to

inform the respondents that while the sum was agreed, time for payment could not be agreed, and thereby seek to agree a payment schedule.

50. Mr Klarecki's assertion that the claimant made her offer after she had reached payment of £2,320 could not have been right. She began payment at the latest in February 2017 and by April 2018 must have reached £2,320.00. It would have been open to Mr Klarecki to put his settlement proposal then.

51. It was unreasonable to delay doing so until after 5pm on the afternoon before the hearing. Mr Klarecki had by that time been conducting employment tribunal proceedings for a number of years and he must have been aware that the respondents had by that time incurred the cost of preparation for the hearing the following day. He must at least have known that it might not have been feasible to act upon a proposal sent and timed when it was. This obvious unreasonableness was compounded by the flippancy of his response to the tribunal's questions on the matter.

52. It seemed to us right to make a further award, which we have set at £320.00, equal to two months further payments. In so recording, we place on record that which we stated at the hearing, namely that if we had power to make that award against Mr Klarecki personally as an award of wasted costs, we would have done so. For reasons set out at paragraph 69 of the Southam judgment, we were unable to do so.

_____
Employment Judge R Lewis

Date: 2 August 2018

Sent to the parties on: .....

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For the Tribunal Office