EMPLOYMENT TRIBUNALS

Claimant: Mr C Telesford

Respondent: Marks & Spencer plc

Heard at: London South Employment Tribunal (in chambers)

Before: Employment Judge Abbott, Mrs K Charman and Mr T Harrington-Roberts

JUDGMENT ON COSTS

The Respondent's application for a costs order under Rule 76 of the Employment Tribunals Rules of Procedure 2013 succeeds. The Claimant is ordered to pay the Respondent the sum of £2,000 in respect of costs.

REASONS

1. By its Judgment of 12 August 2024, for reasons given orally that day, the Tribunal found in favour of the Respondent in respect of the Claimant's claims for unfair dismissal, discrimination arising from disability, failure to make reasonable adjustments, harassment related to disability, sexual harassment and victimisation. Written Reasons for the Judgment were sent to the parties on 17 October 2024.

2. The Respondent has applied for a costs order on the basis that the Claimant acted vexatiously, abusively, disruptively or otherwise unreasonably in the bringing of the proceedings and/or in his conduct at the final hearing. It also relies on 'without prejudice save as to costs' offers that were made prior to the final hearing. It limits its costs claim to the fees incurred in instructing counsel for the final hearing, those fees amounting to £4,250 plus VAT.

3. The Claimant resists the application. He argues that the threshold for making a costs order is not met. In particular, he argues that the Tribunal's findings that he gave some evidence that was false does not itself justify making an adverse costs order. He says that his decision to proceed to trial cannot be said to be unreasonable given the evidential issues at play. He says that the dismissal of his claim is sufficient sanction. He also relies on the fact that he is dependent upon State benefits and is of very little means.

4. The Respondent requested that the application be determined on paper and, in his response, the Claimant said he was content for that approach to be taken. We are satisfied it is appropriate in the interests of justice and the furtherance of the overriding objective to determine the application on paper, and have done so based on the written submissions of the parties.

The law

5. Rule 76(1) provides (insofar as relevant):

> "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 […]"

6. In other words, there is a three-stage process. First, we must ask whether the Claimant's conduct falls within rule 76(1); if so, we must go on to determine whether it is appropriate to exercise our discretion in favour of awarding costs against the Claimant; and if so, we must quantify the order (Rule 78).

7. Rule 84 provides that, in deciding both whether to make a costs order, and if so, in what amount, the Tribunal may have regard to ability to pay.

8. Costs orders in the Employment Tribunal are the exception rather than the rule (*Yerrakalva v Barnsley Metropolitan Borough Council and anor* [2012] ICR 420, CA at [7]).

9. The Employment Appeal Tribunal (HHJ Auerbach) discussed the approach to applications under Rule 76(1) in *Radia v Jefferies International Ltd* [2020] IRLR 431.

    a. The EAT noted at [62-63] that "The Tribunal may consider, in a given case, under (a), that a complainant acted unreasonably, in bringing, or continuing the proceedings, because they had no reasonable prospect of success, and that was something which they knew; but it may also conclude that the case crosses the threshold under (b) simply because the claims, in fact, in the Tribunal's view, had no reasonable prospect of success, even though the complainant did not realise it at the time. The test is an objective one, and therefore turns not on whether they thought they had a good case, but whether they actually did. … However, in such a case, what the party actually thought or knew, or could reasonably be expected to have appreciated, about the prospects of success, may, and usually will, be highly relevant at the second stage, of exercise of the discretion."

    b. The EAT then provided guidance at [64] as follows: "This means that, in practice, where costs are sought both through the Rule 76(1)(a) and the Rule 76(1)(b) route, and the conduct said to be unreasonable under (a) is the bringing, or continuation, of claims which had no reasonable prospect of success, the key issues for overall consideration by the

Tribunal will, in either case, likely be the same (though there may be other considerations, of course, in particular at the second stage). Did the complaints, in fact, have no reasonable prospect of success? If so, did the complainant in fact know or appreciate that? If not, ought they, reasonably, to have known or appreciated that?"

10. Matters of causation may be relevant, per *Yerrakalva* at [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. [...]"

11. The Claimant directed the Tribunal's attention to the following principles drawn from EAT decisions, to which we have had regard in reaching our decision:

    a. A lie on its own will not necessarily be sufficient to found an award of costs. It will always be necessary for the tribunal to examine the context and to look at the nature, gravity and effect of the lie in determining the unreasonableness of the alleged conduct. (*HCA International Limited v May-Bheemul* UKEAT/0477/10/ZT, subsequently endorsed in *Arrowsmith v Nottingham Trent University* [2012] ICR 159, CA).

    b. Costs should not automatically be awarded simply because a party has knowingly given false evidence (*Kapoor v Governing Body of Barnhill Community High School* UKEAT/0352/13/RN).

    c. The question of whether or not a party lied should not be mistaken to be the minimum threshold for determining that there has been unreasonable conduct such as to justify a costs order; equally, the fact that there have been no lies does not mean there cannot be a finding that the proceedings were brought or conducted unreasonably (*Topic v Hollyland Pitta Bakery and ors* UKEAT/0523/11/MAA).

    d. A claimant in the Employment Tribunal will not necessarily be liable for costs where he or she rejects a 'without prejudice save as to costs' offer and is eventually awarded less than that offer, or the claim fails entirely. However, a claimant's refusal of such an offer is a factor that a tribunal can take into account in deciding whether to award costs (*Kopel v Safeway Stores plc* [2003] IRLR 753, EAT).

Discussion

Stage 1: Conduct engaging Rule 76(1)?

12. The Respondent relies on two specific matters as conduct engaging Rule 76(1). We will deal with each in turn.

13. First, it says that the Claimant's complaint of sexual harassment was groundless, vexatious and founded on an allegation against Ms Ehiemua which was entirely fabricated. It says that these false allegations had a

significant impact on Ms Ehiemua. The Claimant relies on the principles stated above that the giving of false evidence does not necessarily amount to the unreasonable conduct of a case.

14. We accept the Respondent's submission on this point. We addressed the Claimant's evidence in relation to this allegation in paragraphs 13b and 28 of the Written Reasons. We found it was false evidence. It was also groundless, since it found no support outside of the Claimant's assertions in this Tribunal claim – it was not put in writing by the claimant, or recorded in writing by anyone, during the Claimant's employment despite him raising repeated complaints about Ms Ehiemua's conduct. The Claimant must have known that it was a false allegation yet decided to pursue it.

15. Moreover, an allegation of sexual harassment is by its nature a very serious one with potentially very serious consequences for the alleged perpetrator, as the Claimant should reasonably have recognised. It was an allegation that went to the heart of the Claimant's case – as we said in paragraph 13b of the Written Reasons, the Claimant asserted that substantially all of the ills that he says he suffered from April 2021 onwards were as a direct consequence of his rejection of the alleged 'pass' from Ms Ehiemua. It also created a different focus of allegations against Ms Ehiemua, separate from ones mostly concerned with criticism of the way she managed the Claimant, where she was, in effect, acting vengefully towards him for rejecting her advances.

16. Accordingly, the Tribunal is satisfied that, on examining the context of the false evidence, it does amount to unreasonable behaviour on the part of the Claimant, both in respect of the making of the knowingly-false allegation from inception, and the pursuit of that complaint to the final hearing. Rule 76(1) is engaged in respect of the allegation of sexual harassment.

17. Second, the Respondent says that the Claimant's oral evidence about being in contact with his GP between June 2020 and July 2021 about his symptoms was false evidence that amounted to unreasonable conduct. It says that this was evidence fabricated in order to bolster his claim. The Claimant relies on the principles stated above that the giving of false evidence does not necessarily amount to the unreasonable conduct of a case.

18. We accept the Respondent's submission on this point also. We addressed the Claimant's evidence in relation to this in paragraphs 13a and 23 of the Written Reasons. The need for the Claimant to prove that he was disabled for the purposes of the Equality Act 2010 was fundamental to many of his complaints, and this evidence was an important attempt to support that argument. The conduct was all the more egregious given that the Tribunal gave him a second opportunity to address this point after it had come up in cross-examination and, despite the obvious written evidence to the contrary, the Claimant maintained his position. The Claimant must have known that this was false evidence; indeed, the Tribunal rejected the submission that it was down to confusion, as set out in paragraph 13a of the Written Reasons.

19. The Tribunal is satisfied that, on examining the context of this false evidence, it does amount to unreasonable behaviour on the part of the Claimant in the conduct of the proceedings. Rule 76(1) is engaged in respect of this conduct also.

Stage 2: discretion

20. We consider the following factors to be relevant to the exercise of the discretion in this case:

    a. The nature and gravity of the false evidence and the circumstances in which it was given, as already set out in paragraphs 14-15 and 18 above.

    b. That the Claimant was, at least at the outset of the claim, a litigant-in-person (Ms Brooke-Ward having been engaged on a Direct Access basis for the final hearing). However, given the nature of the false evidence on the sexual harassment and the fact that the Claimant was represented at the time he gave the false oral evidence in relation to GP contacts, this is of little weight.

    c. The Claimant's limited financial means. The evidence before us shows that he is partly dependent on State benefits, with a monthly surplus of only around £312 per month after expenditure.

    d. That the Respondent did make a 'without prejudice save as to costs' offer that, had it been accepted, would have meant the Claimant received the sum of £4,250 and would have avoided having to pay his own Counsel in respect of a 6-day final hearing.

21. On balance, we are satisfied that this is an appropriate case in which to exercise our discretion to make an award of costs. The very serious, and knowingly false, nature of the allegations, in our judgement, weighs heaviest in the balancing exercise.

Stage 3: quantification

22. The Respondent limits its claim for costs to the fees of counsel for the final hearing, that being £4,250 plus VAT. The costs claimed are under £20,000, so we can make an order ourselves (Rule 78(1)(a)).

23. We accept that, even if the false allegation of sexual harassment had not been made, there would still very likely have been a final hearing in this case. Equally, even without the false evidence as to contact with his GP, the question of disability would still need to have been resolved looking at all of the other evidence that was available. Nevertheless, the false evidence, in particular the allegation of sexual harassment, did have a material effect – as already said, it was an allegation that went to the heart of the Claimant's case.

24. In quantifying the award, we need to balance the factors set out above, in particular the seriousness of the false evidence and its effects against the Claimant's financial means. In our judgement, an award of £2,000 achieves an appropriate balance.

25. Although this is not a matter for the Tribunal but for enforcement, if the Claimant does not consider that it is possible to pay the costs award as a lump sum, he would be well-advised to seek to agree a payment plan with the

Respondents as soon as possible.

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Employment Judge Abbott

Date: 20 November 2024

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Sent to Parties**.**
21 November 2024