



EMPLOYMENT TRIBUNALS

Claimant: Ms S Southgate
Respondent: The Wilf Ford Family Trust
Heard at: Leeds **On:** 16 March 2017
Deliberations: 24 March 2017
Before: Employment Judge Rogerson
Members: Mrs V M Griggs
Mr K Lannaman

Representation

Claimant: Mr E Legard (counsel)
Respondent: Ms K Jeram (counsel)

COSTS ORDER RESERVED JUDGMENT

The Respondent's application for a costs order, made under rule 76 of the Employment Tribunals Rules of Procedure Regulations 2013 is granted. The Claimant is ordered to pay the Respondent costs in the sum of £12,500.

REASONS

- 1 The Tribunal in its reserved judgment with reasons dated 21 November 2016, dismissed all of the complaints made by the Claimant of wrongful dismissal, unfair dismissal, direct sex discrimination, harassment related to sex and automatically unfair dismissal.
- 2 Rule 76 of the Employment Tribunals Rules of Procedure Regulations 2013, deals with the 'circumstances' when a costs order can be made. Rule 78 deals with the 'amount' of a costs order and Rule 84 deals with the 'ability' of the paying party to pay a costs order.

Rule 76(1) provides that, "*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) have acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way the proceedings (or part)*

have been conducted ..; or (b) any claim or response had no reasonable prospect of success”.

Rule 84, deals with the paying party’s “Ability to Pay”, and provides that *“In deciding whether to make a costs, preparation time, or wasted costs order, and if so 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”.*

Rule 78 provides that the Tribunal can make a summary assessment if the costs order is less than £20,000 or by way of detailed assessment if it exceeds that amount.

- 3 By letter dated 19 December 2016, the Respondent made an application for costs based on two grounds. Firstly that the Claimant had acted unreasonably in bringing and conducting these proceedings and secondly because the claim had no reasonable prospects of success.
- 4 Dealing with the ‘unreasonable’ conduct ground first. The Respondent has set out a detailed history to these proceedings and the conduct of the Claimant that is said to be unreasonable. The Respondent sets out the relevant paragraphs of the Tribunal’s reasons to support its application for costs. It highlights the fact that the Claimant had made a very serious allegation against the Trust/Senior managers without any supporting evidence and without belief in its truth. At the hearing, the Claimant gave differing explanations for the amended e-mail which undermined her accusation entirely. The Tribunal found it was *“clearly unsustainable at the hearing” (paragraph 30) and the Claimant was “clutching at straws because she had been caught out lying” (paragraph 31).* The Tribunal found that *“Only the Claimant could have produced the e-mail.. only she knows why she did this” (paragraph 31).* Further, the Tribunal found that *“For the Claimant to advance three explanations for the booking but still maintain the very serious allegation she makes of the Trust alleging deliberate tampering of evidence to boost their case, was “scandalous” behaviour on her part, when it is clear that the only person who has tampered with the e-mail is the Claimant. This demonstrates the lengths the Claimant was/is prepared to go to present a case that fits her account rather than honestly and openly giving her account of events. This supported our view that she was not a credible witness” (paragraph 31).*
- 4 The Respondent asserts that this issue goes to the heart of the Claimant’s claims since it’s case was that her actions demonstrated that she had not taken the customer’s best interest into consideration, she had not been open or transparent about her actions at the time, or during the investigation and the disciplinary process or at the tribunal hearing. As a consequence, the Trust’s actions in investigating and dismissing her were clearly justifiable at the time, **as should have been abundantly clear to the Claimant.**
- 5 The Respondent quotes further paragraphs of the judgement as examples of the ‘unreasonable conduct’ of the Claimant. The Tribunal found the Claimant ***“was trying to make the evidence fit rather than being open and transparent” (paragraph 36 – see also paragraphs 46 and 50),*** and that the explanation was *“not credible” (paragraph 53).* **Her approach demonstrated a willingness on her part to manipulate the evidence to fit the facts.** The Tribunal also found that the Claimant had made

deliberate efforts to conceal her actions. The Tribunal found that “*she was going to keep this quiet and provide a paper trail (like the e-mail) which fit in with her cover up of the cancelled day*” (paragraph 38).

- 6 We agree there are clear findings of unreasonable conduct. Our use of the words “*scandalous,*” “*deliberate,*” “*manipulate*” “*cover up*” “*concealment*” were not words we used lightly but reflected the seriousness of the Claimant’s conduct.
7. The Respondent having set out in detail the findings relied upon to support its case of unreasonable conduct, the Claimant’s response to that is surprisingly brief. On the third page of the Claimant’s response to the Costs application dated 24 January 2017 the response is “*The Tribunal made findings as to the credibility of the Claimant and her witnesses, as it must do so. The examples provided by the respondent (at page 3 of its application) were clearly relevant to the Tribunal’s finding that the Claimant’s version of events lacked credibility and ultimately that the Claimant’s claims were dismissed, but as costs do not follow the event this does not give grounds to support the respondent’s application*”.
8. This in our view seeks to minimise the findings of the Tribunal. This was not just a case of the Tribunal preferring one witness account over another and making findings of fact on disputed evidence. It was a case where very serious findings of fact have been made against the Claimant based on her conduct during the disciplinary process and at the hearing. This was a case where the Claimant had produced fabricated and false evidence to the Respondent and to the Tribunal and had blamed the Respondent for its creation when she knew all along that she had created it. She had lied to the Respondent and had then lied to the Tribunal. Evidence had been manipulated deliberately by the Claimant in a deliberate cover up of her own misconduct.
- 9 At this hearing, Mr Legard’s submission on this finding was:

“the allegation made by the Claimant namely that the respondent was responsible for amending the 17 June 2015 e-mail was unsustainable in light of the expert report”.

He does not make any reference to the relevant paragraph of the Employment Tribunal’s decision, which is paragraph 31, and his summary also seeks to minimise the findings of the Tribunal. The allegation was unsustainable because the Claimant lied. In our reasons we set out the Claimants changing evidence, and find:

“The Claimant was ‘clutching at straws’ because she had been **caught out lying**. Only the Claimant could have produced the email. Only the Claimant could have amended the email...Only she knows why she did this. For the Claimant to advance 3 explanations for the booking, but still maintain, the very serious allegation she makes, that the Respondent deliberately tampered with evidence to boost their case, was ‘**scandalous**’ behaviour on her part, when it was clear that the only person who has tampered with the email is the Claimant. This **demonstrates the lengths the Claimant was/is prepared to go to present a case that fits her account rather than honestly and openly giving her account of events**. This supports our view she was not a credible witness”.

- 10 The ‘lying’ and ‘scandalous’ behaviour was only part of the picture. There was other deliberate manipulation and cover up of evidence which has

been highlighted by the Respondent which only adds to the overall unreasonable conduct of the Claimant in bringing and conducting these proceedings.

- 13 In relation to the 'lie', Mr Legard reminded the Tribunal that the Court of Appeal has emphasised that a lie will not necessarily *of itself* be sufficient to found an order for costs and refers to the case of **HCA International Limited v May-Bheemul** [UKEAT/0477/10 23 March 2011 unreported] where Cox J made the point that no case established a point of principle of general application that lying, even in respect of a central allegation in case must inevitably result in an award of costs and that "*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*". The principle that lying will not automatically justify an award of costs was applied by the EAT in **Kapoor v Governing Body of Barnhill Community High School** [UKEAT/0352/13]. In that case Singh J held that a Tribunal which, in awarding costs against a Claimant who had been untruthful in putting forward her case, had stated *without more, to conduct a case by not telling the truth is to conduct a case unreasonably, it is as simple as that, had misdirected itself in law in a manner that had tainted its whole approach to the exercise of its discretion*.
14. We distinguish the **Kapoor** case on its facts which were very different to the facts of this case. This case was not simply about the Claimant telling a lie, it had to be seen in the context of all of her actions that follow. We have carefully examined the conduct of the Claimant as a whole. Unlike the **Kapoor** case where the Claimant was unrepresented, Mr Legard reminded us at this hearing that the Claimant has been represented by 'experienced solicitors and experienced counsel' throughout this case. Unlike the **Kapoor** case we have made very serious findings of unreasonable conduct by the Claimant which go far beyond her simply not telling the truth. Her lie had a material impact because it showed the lengths she "was/ is prepared to present a case that fits her account". She fabricated evidence and then scandalously blamed the Respondent for that at the hearing when she knew that was untrue.
- 18 Her unreasonable conduct warrants the Tribunal exercising its discretion to award costs in this case based on the findings of fact we have referred to. In those circumstances we do not go on to consider whether costs should be awarded on the ground the claim had no reasonable prospects of success.
- 21 In relation to 'ability to pay' Ms Jeram invites us to take no account of the Claimant's ability to pay because she is not 'credible' because the Claimant has demonstrated that she has no difficulty in misleading and lying to her employer in circumstances where she felt she was under scrutiny even before disciplinary proceedings had begun. The Claimant has satisfied the Tribunal that she is content to lie under oath in order to maximise her chances of succeeding in her claims. It is difficult to see circumstances where she could satisfy the Tribunal that the evidence she gives is reliable, when she is only likely to lose from the situation.
- 22 She invites the Tribunal to carry out a detailed assessment of costs. In the alternative she submits that if the Tribunal is to take into account the Claimant's means or to make a summary assessment of the costs then it

should follow the EAT's observations in Vaughan and set the cap at a level which entitles the respondent to the benefit of any doubt even to a generous extent.

- 23 In Vaughan v London Borough of Lewisham & Others [2013] IRLR 713 the Employment Tribunal had awarded one third of the respondent's costs and the EAT had held that was not perverse and that "*There is no reason why the question of affordability has to be decided once and for all by reference to a party's means as at the moment the order falls to be made. The order would have to have been enforced through the County Court, which would itself have taken into account the appellant's means from time to time in deciding whether to require payments by instalments, and if so in what amount. The questions of whether it was realistic that she would make payment or reasonable to make her do so were very open ended. There was nothing wrong in principle in the Tribunal setting the cap at a level which gave the respondents the benefit of any doubt, even to a generous extent. It had to record that affordability was not, as such, the sole criterion for the exercise of the discretion, accordingly a nice estimate of what could have been afforded was not essential*".
- 24 In contrast, Mr Legard invites us not to make a costs order because of the Claimant's very limited means. In a document produced by the Claimant on 24 January 2017, in response to the application for costs, the Claimant states that her monthly income was a salary of £877, £920 gross. She receives tax credits, child maintenance and child benefits bringing the total income to £1,660.85 with outgoings totalling £1,398.94 leaving her with the balance of £261.90 for food, fuel and other childcare costs. She tells us she is in the process of a divorce but has no assets or any share in any assets other than a car she owns which has little cash value.
- 26 At this hearing she told us that she is currently working 22 hours a week earning £10.40 an hour. That equates to a sum of £1,014 a month. That figure matches the gross totals provided for in the two wage slips that the Claimant provided which show a taxable gross pay of £11,152.85 as at 3 March 2017. The payslips the Claimant provided at this hearing for February 2017 and March 2017 show a sum of £922.93 and £877.32 but they include a payment for holiday pay. The figure the Claimant gave in the document does not accurately represent the evidence the Claimant gave to the Tribunal of 22.5 hours at £10.40 an hour or the total gross to date figure. The actual figure therefore the Claimant receives in salary is not £920 gross but £1,014 per month gross. This is another area where the Claimant has chosen not provided accurate information to this Tribunal.
- 27 The Claimant also told us that she could work full time but has chosen not to look for that full time work even though she could potentially earn at least up to £23,000. She also rents a farmhouse which costs her £845 per month. She could reduce the amount of rental income she is paying by renting a smaller and cheaper property. The Claimant is therefore able to improve her means in the future.
- 28 We took into account the credit card debt that the Claimant has of £1,300, the £10,000 she owes her mother and the £1,000 she owes a family friend. She is not currently making any repayments in relation to those debts and is not being required to make any repayments in relation to the money borrowed from friends and family.

- 29 The Respondent in this case has incurred costs in excess of £50,000. They have also incurred the cost of instructing a costs draftsman to prepare a detailed bill of costs (£1,800). They have incurred disbursements for Counsels fees for the six day hearing of £12,750 including VAT. The Claimant's solicitors have prepared 'points of dispute on the Respondent's bill of costs suggesting a figure of just under £20,000 if the bill is assessed.
- 30 We considered what amount of costs we should order in this case having regard to the Claimant's ability to pay and her ability to improve her financial position. We had regard to the £50,000 costs incurred by the Respondent, is a large cost for a charitable organisation to have to incur unnecessarily in having to defend these proceedings which should never have been brought. Adopting a broad brush approach, and having regard to all of the information, we consider it is appropriate for the Claimant to pay a quarter of those costs in the sum of £12,500. This we know will not recompense the Respondent in full for those costs and may be setting the cap at a less generous amount than could be set. However it was in our view the appropriate amount to award in all the circumstances.

Employment Judge Rogerson

Date: 07 April 2017

Sent on: 10 April 2017