



## **EMPLOYMENT TRIBUNALS**

BETWEEN

**Claimant**  
Ms J Davis

and

**Respondent**  
BP plc

### **JUDGMENT ON APPLICATION FOR COSTS**

1. A Costs Order is made in favour of the Respondent in the sum of £2,000. The Claimant is ordered to pay this sum to the Respondent.
2. Reasons for this judgment are attached.

### **REASONS**

#### **BACKGROUND**

- 1 A 3 day full merits hearing was held at Reading Employment Tribunals on 9-11 January 2017. The Claimant's complaint of Automatically Unfair Dismissal under section 100(1)(c) Employment Rights Act 1996 failed and was dismissed. Reasons for the judgment were given orally at the hearing and written reasons were also sent to the parties on 2 February 2017.
- 2 At the end of the hearing the Respondent made an application for a costs order. The Respondent was ordered to put the application in writing and the Claimant was ordered to provide a written response and details of her ability to pay such an order.
- 3 The Respondent's written application was dated 16 February 2017 and the Claimant's written response was dated 1 March 2017.
- 4 Both parties agreed that the application and the response may be considered by the Tribunal without the need for a hearing.
- 5 References to rules below are to rules under Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

## RELEVANT LAW

- 6 *Rule 75(1) - A costs order is an order that a party (the paying party) make a payment to - another party (the receiving party) in respect of the costs that the receiving party has incurred while legally represented or while represented by a lay representative; ....*
- 7 *Rule 76(1) - 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.*
- 8 The Tribunal rules impose a two stage test. First the Tribunal must ask whether a party's conduct falls within rule 76(1)(a) or (b). If so, the Tribunal must then go on to ask whether it is appropriate to exercise the discretion in favour of awarding costs against that party.
- 9 Gee v Shell UK Limited [2003] IRLR 82. The Court of Appeal confirmed that it is a fundamental principle that costs are the exception rather than the rule and that costs do not follow the event in Employment Tribunals.
- 10 McPherson v BNP Paribas [2004] ICR 1398. In determining whether to make an order under the ground of unreasonable conduct, a Tribunal should take into account the "*nature, gravity and effect*" of a party's unreasonable conduct.
- 11 Barnsley Metropolitan Borough Council v Yerrakalva [2012] ICR 420. The vital point in exercising the discretion to order costs is to look at the whole picture. The Tribunal has to ask whether there has been unreasonable conduct by the paying party in bringing, defending or conducting the case, and, in doing so, identify the conduct, what was unreasonable about it, and what effect it had.

## RESPONDENT'S APPLICATION

- 12 The Respondent claimed that its legal costs amounted to £33,212 and a detailed schedule of legal costs incurred was attached. Later, in an e-mail dated 6 March 2017, having considered the Claimant's response, the Respondent reduced the sum claimed to £9,000.
- 13 It was claimed that the Claimant's complaint had no reasonable prospect of success under rule 76(1)(b). And that she had acted vexatiously, abusively, disruptively or otherwise unreasonably under rule 76(1)(a) in failing to withdraw her claim and /or that she had embellished her evidence.

- 14 Reference was made to two costs warnings in letters dated 20 July 2016 and 22 September 2016. In those letters the Respondent said that the Claimant's claim had no prospect of success, set out the weaknesses in the case, and said that it would be unreasonable to continue to pursue it. It warned that legal costs were being incurred and that it would make an application for costs if the claim failed. It offered her the opportunity to withdraw the claim in which case it would not pursue her for costs. It advised her to take legal advice and left the offer of withdrawal open until 7 October 2016.
- 15 The Claimant did not withdraw and continued to pursue her claim, which eventually failed on the substantially the same grounds as raised in the warning letters.

### **CLAIMANT'S RESPONSE**

- 16 The Claimant denied that her claim had no reasonable prospect of success or that she had acted vexatiously, abusively, disruptively or otherwise unreasonably in pursuing it or failing to withdraw it.
- 17 She said that the Tribunal did not strike out her claim or order her to pay a deposit at the preliminary hearing on 30 June 2016 and allowed her to amend the claim. She took that as a sign that her claim had some substance. She took legal advice after the first letter and before making the application to amend. She saw the costs warning letters as threats to drop the case, which angered her and made her more determined to proceed.
- 18 She denied that she had embellished her evidence.
- 19 She disputed the amount of costs claimed and provided a spreadsheet showing her monthly income as £2,340 and outgoings as £2,179. She has one dependent child and no savings. She is currently employed on a 3 month temporary contract.

### **DECISION**

- 20 I took full account of the contents of the Respondent's written application dated 16 February 2017 and the Claimant's written response dated 1 March 2017. I also re-read the Tribunal judgment and reasons sent to the parties on 2 February 2017.

#### No Reasonable Prospect of Success

- 21 In Scott v Inland Revenue Commissioners Development Agency [2004] ICR 1410, the Court of Appeal observed that in considering whether a claim has no reasonable prospect of success, the key question is not whether a party thought he was in the right, but whether he had reasonable grounds for doing so. In other words, an objective view is required as to whether the claim had any prospect of success at any time of its existence.

22 I took account of the findings and conclusions in the judgment and reasons and paid particular attention to the findings in paragraphs 48 – 50 as follows:

*48 I have already stated above that I can find no evidence of animosity by Mr Paruch towards the Claimant's health and safety disclosures. I could find no evidence whatsoever to support the Claimant's assertion of a health and safety disclosure motivated dismissal. I have looked for evidence of overt or subconscious motivation and I can find none. Such evidence simply did not exist in the evidence placed before me, either verbal or documentary.*

*49 It was implausible, if such a motive existed, that the Claimant's probationary period would have been extended in July 2015 when there was an opportunity to terminate her employment then under the Respondent's probation policy. I note also that Mr Paruch's concerns in March 2015 regarding the Claimant's performance pre-date any of the health and safety disclosures.*

*50 On the contrary, there was ample evidence to support the accounts of Mr Paruch and Ms Punshon. There was a plausible, non-discriminatory reason for the dismissal, that is capability based upon unsatisfactory performance.*

23 The Claimant said she believed that her dismissal was motivated by her health and safety disclosures but there was no rational basis for any such belief. The claim had no reliable evidential foundation and, viewed objectively, there never was any basis for the claim. It appeared to be a means of pursuing a claim for unfair dismissal in circumstances where she did not otherwise have sufficient qualifying employment to bring such a claim.

24 At paragraph 31 of the judgment reasons it was found that the Claimant appeared to have embellished her evidence in her witness statement to add weight to her claim of health and safety motivation.

25 Although not represented at the hearing, the Claimant had the benefit of legal advice beforehand.

26 The claim had no reasonable prospect of success.

#### Unreasonable Conduct of Proceedings

27 The warnings in the Respondents' letters dated 6 July 2016 and 22 September 2016 were reasoned and detailed, clearly setting out the weaknesses in the claim which were substantially the same as found by the Tribunal. The first letter in particular set out why the claim would fail. The Claimant chose to ignore the warnings and continued to pursue her case, aware of the weaknesses, and knowing that substantial legal costs were being incurred by the Respondent.

28 This amounted to unreasonable conduct of the proceedings.

Discretion to Award Costs

- 29 Having found no reasonable prospect of success and unreasonable conduct, I went on to consider whether to exercise the discretion to make a costs order.
- 30 By pursuing the unmeritorious claim, the Claimant put the Respondent to unnecessary legal expenses. It would have been apparent to the Claimant that considerable costs would be incurred by the Respondent in preparation for, and representation at, a 3 day Tribunal hearing.
- 31 For its part, the Respondent could not have done more to alert the Claimant to the genuine weaknesses in her case and to offer her the opportunity on 2 occasions to withdraw without incurring a costs liability. She stubbornly failed to heed the warnings.
- 32 Account should also be taken of the significant time and effort invested by the Respondent in trying to resolve the Claimant's grievances internally by the Human Resources department in June 2015 and by the Open Talk procedure in December 2015. Both found no unfair treatment of the Claimant.
- 33 It is appropriate in these circumstances to make an award of costs.

**AMOUNT OF COSTS ORDER**

- 34 Although of limited means, the Claimant has some income which would enable her to pay a costs order.
- 35 The costs incurred by the Respondent were substantial and it was a reasonable and proportionate gesture to reduce the claim to £9,000.
- 36 In view of the Claimant's limited means it would not be reasonable to order her to pay the full amount claimed. A costs order in the sum of £2,000 is a small contribution towards the unnecessary costs incurred by the Respondent, but represents a significant sum for the Claimant.

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Employment Judge Vowles

21 March 2017

Judgment sent to the parties on

30 March 2017

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for the Tribunal Office