EMPLOYMENT TRIBUNALS

Heard at: Croydon (by video) **On:** 9 October 2024

Claimant: Mr Oliver Metcalfe

Respondent: St John's School Foundation

Before: Employment Judge E Fowell

Representation:

Claimant No appearaance

Respondent Mr John Ratledge of counsel

JUDGMENT

1. The claimant is liable to pay the respondent's costs in the sum of £19,706.52.

2. The order for costs is not to be enforced without the leave of the tribunal.

REASONS

Background

1. This is the respondent's application for costs following the judgment on liability sent to the parties on 27 February 2024.

2. The application was made on 25 March 2024, on the basis that the claimant was found to have fabricated a number of key documents.

3. Mr Metcalfe did not attend this hearing but on 8 May 2024 he made a written response to the application. The main point relied on was that he did not have the means to pay a cost order, that he was currently unemployed and had been so since the end of his employment with the respondent in October 2022 and had no regular income. He added that he had no savings. No further information has been provided by him about his means in the subsequent five months to this hearing.

4. Attempts were made to contact Mr Metcalfe by phone this morning to see if he intended to join the hearing, without success. He was sent the notice of hearing and the respondents provided him with a copy of their bundle of documents on 4 October.

The threshold for costs

5. Rule 76 provides:

> (1) A Tribunal may make a costs 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;
>
> (b) any claim or response had no reasonable prospect of success; …"

6. The test therefore requires only unreasonable conduct. The Employment Appeal Tribunal, in **Ghosh v Nokia Siemens Networks UK Ltd** EAT 0125/12, upheld an employment tribunal's costs order against a claimant who had made a number of 'wholly unsubstantiated allegations' of discrimination. They stated that making such serious and unsubstantiated allegations was 'undoubtedly' capable of amounting to unreasonable conduct.

7. In his written response to the claim Mr Metcalfe referred me to two cases:

   (a) **HCA International Limited v May-Bheemul** UKEAT/0477/10 and

   (b) **Kapoor v Governing Body of Barnhill Community High School** UK EAT/0352/13

8. These were to the effect that a mere lie was not enough to lead to an award of costs. In **HCA** it was held that:

> '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.'

9. This statement was subsequently endorsed by the Court of Appeal in **Arrowsmith v Nottingham Trent University** 2012 ICR 159, CA. In that case, the Court upheld the award of costs against a claimant whose complaint of sex discrimination relied on untrue assertions that job interviewers knew about her pregnancy when deciding not to offer her the job.

10. The present case however involves a pattern of fabricated documents, designed to mislead the tribunal and present a fundamentally false picture of the respondent's

actions. It goes well beyond resorting to falsehood in the course of a hearing. I have no doubt that in submitting these documents, and defending them, Mr Metcalfe acted unreasonably and so the threshold for the award of costs is met.

The discretion to award costs

11. The opening line of section 76 uses the word 'may' however, indicating that there is a discretion as to the award of costs, even where this test is satisfied. If so, there is also a discretion as to the amount or proportion of the costs to be paid.

12. The claim for costs is made in the sum of **£21,097.32**, i.e. £17,581.10 plus VAT. For a three day hearing of some complexity, covering events over a period of years, this is very much of the lower end of what one might expect to see. The hourly rates claimed are

    (a) £192 for a Grade B fee earner

    (b) £161 for a Grade C fee earner

    (c) £118 for a Grade D fee earner

13. That has been summarily assessed, on what is known in the civil courts as the standard basis, i.e. such costs as are reasonably incurred and reasonable in amount, with any doubts resolved in favour of the paying party.

14. Some reduction was made to the time spent on personal attendances in writing on the respondent and on others (generally the tribunal), amounting to 5 hours at Grade C and 3 hours at Grade D. That reduced the total by £1159 plus VAT, or £1390.80. Hence the overall sum assessed was £19,706.52, including VAT.

15. Mr Metcalfe has provided no response to the schedule of costs.

The relevance of finances

16. By Rule 84:

> '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.'

17. Lord Justice Underhill addressed this aspect in **Vaughan v London Borough of Lewisham** (No. 2) [2013] IRLR 713 stating at §28:

> 'It is necessary to remember that whatever order was made would have to be enforced through the County Court, which would itself take into account the [claimant's] means from time to time in deciding whether to require payment by instalments, and if so in what amount.'

18. In that case the claimant was ordered to pay one third of the respondent's costs, which were said to be £260,000. In making that order, the Tribunal took into account the claimant's earning potential, as follows [quoted at §8]:

> 12. In considering whether a costs order should in fact be made, we have considered the Claimant's means. From the evidence presented, the Claimant appears to have limited means. She is currently on benefits and has no savings or capital assets. However in the case of **Arrowsmith v Nottingham Trent University** [2011] EWCA Civ 797, it was held that costs orders do not need to be confined to sums the party could pay as it may well be that their circumstances improve in the future.
>
> 13. Although the Claimant is currently unemployed, this has only occurred very recently. The Claimant, at age 36, is relatively young. She has at least 15 years' experience in the care sector and, although signed off sick at the moment, it is her intention, once she is fully fit, to seek re-employment in this field. Up until recently, the Claimant was earning around £30,000 per year. There is no reason to assume that she won't return to her chosen career at this level at some point in the future.

19. Pausing there, Mr Metcalfe is also in the early stages of his working life, and was earning an excess of £40,000 per annum during his employment at the school. I was able to confirm at this hearing that no action had been taken to bar him from continuing to be employed as a teacher, which is a high demand profession.

20. There was also evidence during the hearing that he had set up a mindfulness business online whilst still employed with the respondent but I have no further information as to whether that is continuing or has proved successful. His written response merely says that he has no regular income, which may indicate that he is still operating this business.

21. He does not say that he is on benefits and gives no information about any assets he holds including any interest in property. He has however had the opportunity to provide any such information and the respondent, in its costs application (at page 65 of the bundle for this hearing) also asked him to provide any documentary evidence about his means.

22. The conclusion reached by Underhill LJ in **Vaughan** was at follows [§29]:

> "On that basis the question for the Tribunal – given, we repeat, that it thought it right to have regard to the Appellant's means – was essentially whether there was indeed a reasonable prospect of her being able in due course to return to well-paid employment and thus to be in a position to make a payment of costs; and, if so, what limit ought nevertheless be placed on her liability to take account of her means in that scenario and, more generally, to take account of proportionality. As to the former question, views might legitimately differ as to the probabilities, but the Tribunal was well-placed – better than we are – to form a view that there was indeed a realistic prospect, and we see no basis on which that judgment can be said to be perverse. As to the latter, we see the force of the argument that it would be pointless, and

> therefore not a proper exercise of discretion, to require the Appellant to pay more, even in the optimistic scenario envisaged, than she could realistically pay over a reasonable period; and we have been concerned whether the cap was simply set too high. But those questions of what is realistic or reasonable are very open-ended, and we see nothing wrong in principle in the Tribunal setting the cap at a level which gives the Respondents the benefit of any doubt, even to a generous extent. It must be recalled that affordability is not, as such, the sole criterion for the exercise of the discretion: accordingly a nice estimate of what can be afforded is not essential. Approached in that way, we cannot in the end say that the limit of one-third of the Respondents' costs – whether that comes to £60,000 or some other figure in the range – was perverse. It was of course rough-and-ready, but there is in truth no means of arriving at a more precise figure. We cannot conscientiously say that a proportion of, say, a quarter would have been right while a third was wrong. The Respondents are the injured parties, and even if the order does indeed turn out to be recoverable in full at some point in the future, they will be out-of-pocket to the tune of two-thirds of their assessed costs."

23. I have quoted that lengthy passage to illustrate the broad nature of the assessment and the difficulty of arriving at a firm figure for what a claimant may be able to afford over a reasonable period, especially when little or no information is provided. However, given his age and qualifications, I conclude that the amount which I have assessed is not more than Mr Metcalfe can reasonably be expected to pay over a reasonable period of time, and I see no other basis for making a reduction.

24. However, an appeal is currently in progress in relation to the judgment on liability. If that appeal is successful it may affect the basis of my decision on the award of costs. Accordingly, the costs order is not to be enforced without leave.

Employment Judge Fowell
Date 9 October 2024

Judgment and Reasons sent to the parties
Date 11 October 2024

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Recording and Transcription

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/