When is it worth

Burges Salmon's **Sarah Embleton** and **Natalie Jeffries** discuss the recent changes to employment tribunal rules that give employment judges more flexibility when it comes to awarding costs to employers.

Unlike the civil courts, the employment tribunal has traditionally been a forum where each party bears their own legal costs regardless of the success or otherwise of the claim.

In 2012, out of the 186,300 claims registered in the employment tribunal, only 496 successful costs awards were made. However, new tribunal rules introduced in July 2013 provide employment judges with more flexibility to award costs, including in cases where the costs award exceeds £20,000.

With this in mind, should employers be seeking costs more frequently? Is the potential reward really worth the battle?

Seeking a costs award

Given that employment tribunals do not generally make awards for costs, it will come as no surprise to learn that the circumstances in which an employer might make an application for costs are limited.

A two-stage approach is followed: the tribunal will need to be satisfied that the claimant's behaviour fell into one of the categories set out in the new rules (it is not uncommon for an employer to argue that two, or even three, of the categories apply); and if so, whether or not it should exercise its discretion to make an award.

In relation to the first stage, the employer will need to show that by bringing the proceedings, or through their conduct of the proceedings, the claimant or their representative has acted in one or more of the following ways:

- **Vexatiously or abusively:** An example of this would be where the employee has brought a claim, not with any expectation of being successful, but purely to harass his or her employer. Serial litigants and those who bring nuisance claims to cause maximum distress and inconvenience to the employer have been found by the tribunal to have acted vexatiously or abusively.
- **Disruptively:** A tribunal, for example, found that an employee was acting disruptively when they repeatedly asked for adjournments of a hearing and then turned up inadequately prepared when the hearing finally took place, resulting in a further request for adjournment.
- **Unreasonably:** A claimant who had alleged 71 minor incidents during a two-year period of employment without any consideration of whether or not any of the allegations had any merit, for example, was found to have been acting unreasonably.
- **Where the claim has no reasonable prospect of success:** This covers claims that are factually or legally hopeless, although costs are unlikely to be awarded if a claimant cannot reasonably be expected to have appreciated the weakness of his or her case.

It is worth noting that the new tribunal rules have introduced a "sift stage", whereby an employment judge will consider, on receipt of the claim and response, whether or not either should be struck out because they have no reasonable prospect of success.

Even if a claim proceeds past the "sift stage", it may still be struck out at a preliminary hearing for having no reasonable prospect of success. Arguably, therefore, the number of costs applications where this ground will be argued successfully is limited.

If a tribunal is persuaded that the first stage is met, it will then consider whether or not it ought to exercise its discretion to make a costs award.

To do this, it will consider a range of factors – including whether or not the claimant had legal representation, whether or not a costs award would deter future litigants, and the nature and effect of the conduct – before making its decision.

Costs warnings

An important factor that the tribunal will take into account as part of its decision-making process is whether or not a costs warning was given to the claimant in advance of the costs application.

A warning can be given at any point and usually takes the form of a letter. It is used to warn the other party that they may make an application for costs against them. These warnings can be key to the success of any subsequent application for costs, and it is not unusual for more than one warning to be issued during the course of the proceedings.

The warning should set out the grounds on which a costs application may be made – for example, that the claimant's claim is vexatious or abusive and, where relevant, the claimant should be allowed the opportunity to rectify the position. This may mean compliance with

TOP TIPS FOR CONSIDERING WHEN TO MAKE A COSTS APPLICATION

- Have you got grounds for a costs application? If not, do not make empty gestures; all you will do is lose credibility.
- A tactical decision to seek costs is best taken early if you have the grounds to do so. Consider whether or not to reserve your position in your response to the claim.
- Review the position on costs throughout the course of the proceedings.
- Warn the claimant of your intention to make a costs application in a costs warnings letter.
- Seek information as to the claimant's means to determine whether or not the fight is worth it.

making tribunal cost claims?

tribunal orders or withdrawal of the claim depending on the circumstances. While the warning should also make it clear that the claimant will be liable for the employer's costs – or part of them – should a costs award be made, it is important, particularly where the claimant is unrepresented, to ensure that the costs warning is objective and non-threatening.

Although there is no requirement for a party to issue a costs warning, a failure to do so may affect an employment judge's decision to award costs and so offers the following advantages:

- the claimant cannot use the potential defence that costs should not be awarded because they received no warning of the application;
- the costs application is less likely to be adjourned following the hearing if the claimant was forewarned of it; and
- if the claimant fails to engage with the warning or does not respond or rectify the conduct complained of, you may potentially rely on the lack of engagement/rectification as unreasonable conduct.

Costs applications

A costs application can be made at any stage in the proceedings. However, the claimant's behaviour or the nature of their claim may only give rise to the potential to make an application some way down the line. The issue of costs and whether or not a warning or application might be appropriate should, therefore, be kept under review as the claim proceeds.

Often, it will be only after judgment has been given by the tribunal that a party may decide to pursue an application for costs – even where they have made an earlier costs warning. In those circumstances, it is important to remember that the deadline for making a costs application is 28 days from the date the judgment is sent to the parties.

Is the battle worth fighting?

Even if your costs application looks likely to succeed, it is important to consider whether or not the additional time and expense of making the application are ultimately going to be worth it.

In a stand against the "claims culture", Lord Alan Sugar pursued one of the winners from television show The Apprentice for costs after the employment judge held that her claim for constructive unfair dismissal should never have been brought. Although the application did not succeed, was there benefit to Lord Sugar in making the application?

Potential advantages

- Making an application for costs sends a message to the workforce that you will not take spurious claims lightly, and may act as a disincentive for future claims.
- A costs warning makes the claimant consider carefully whether or not they want to proceed all the way to the hearing, and may encourage them to either withdraw their claim or enter into settlement discussions.
- While the tribunal has the power to take into account the paying party's means, tribunals are prepared to make costs awards even where the claimant can show they have limited means.
- There is also, of course, the potential to recover some of the costs incurred in defending a claim.

Potential disadvantages

- A costs application increases the time and expense in what are likely to be costly proceedings.
- Even if an award is made, it is rarely for the full amount of costs incurred.
- Will the claimant actually pay up if an award is made? Recovering the money can cause its own difficulties and enforceability proceedings are, in themselves, costly and may not be successful.

So, what of the future? Is it more likely that unsuccessful claimants will be reaching for their cheque books? In recent years, employment judges have been more willing to consider costs and the new employment tribunal rules provide the mechanism for a further change in culture.

While the new "sift stage" may weed out many of the less meritorious claims at the outset, the canny employer, embroiled in tribunal proceedings, is advised to keep the question of costs under review and should not shy away from issuing a costs warning or making the follow-up application should the right circumstances arise.

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