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Review

Employment

Careless Talk, Costs, Lies

In *Daleside Nursing Home v Mathew* the Employment Appeal Tribunal decided earlier this year that an Employment Tribunal should have considered a costs award on the grounds of unreasonable behaviour against a Claimant found to have lied about a central plank of her allegations. Logical enough in principle, perhaps, but could it be the thin end of a disconcertingly large wedge? Surely almost any Employment Tribunal claim involves issues of fact where it is the Tribunal's job to make a finding one way or the other? Surely a party whose assertions are not believed has necessarily been found to be lying and so is exposed on costs? The EAT said that "we have approached this Appeal on the basis of the particular clear-cut facts of this case and… nothing that we say is intended to set out any more general statement of legal principle". Here we will consider whether *Daleside* is actually either as wide as it first appears or as narrow as the EAT seems to wish.

It is necessary to remember that Tribunal costs awards are to compensate the victim of the unreasonable behaviour, not penalise the perpetrator of it.

The allegation in *Daleside* (that a manager had called Ms Mathew "a black bitch") was both central to her race claim and particularly unpleasant in nature. If that lie had not been told then there would have been no case, and so no claim for the Respondent to have to incur costs defending. However, if the lie had been in relation to some purely peripheral detail it would be harder for the Tribunal to make the necessary causal connection between that unreasonable conduct and any (or at least the bulk of) the costs incurred by the Respondent. It is necessary to remember that Tribunal costs awards are to compensate the victim of the unreasonable behaviour, not penalise the perpetrator of it – if the victim suffers no demonstrable financial loss as a result of that behaviour then there would be no costs award.

Second, the Tribunal had found that the lie was a deliberate statement in which the Claimant had no genuine belief, and not merely an error or mishearing. It is long established that a claim based on a genuine belief (almost however misplaced, unreasonable or paranoid it may be) will not constitute unreasonable behaviour for the purposes of the Tribunal's costs jurisdiction. Careless inconsistencies in evidence or correspondence or accidental inaccuracies in pleadings will very rarely be the subject of a valid costs claim, though the position may be different if the misrepresentation or discrepancy is pointed out by the other side but nonetheless persisted with, so moving it from potentially inadvertent to unarguably deliberate.

Third, the lie revolved around an issue of fact in relation to which the Tribunal made a factual finding. The law is not an exact science, particularly as it relates to unfair dismissal or discrimination, and it would therefore be entirely possible for two parties to hold strongly opposing views about how the Tribunal should apply the law, both entirely genuinely. The loser in those circumstances might be wrong, but that is a far cry either from lying or behaving unreasonably. It might be, for example, the difference between an allegation that the pre-dismissal consultation had been legally sufficient on the one hand, as against a contention (known to be false) that no dismissal decision had been made until after the consultation on the other. One is a question of judgement and argument and the other is a lie potentially going to the heart of the employer's defence. The first would not be grounds for a costs award but the second potentially could.

Next, there is probably a distinction to be made between lies in the pleadings forming key components of the parties' Claim or Response, and lies given in evidence on the day. Without condoning it, many readers will have seen witnesses who panic when they sense themselves about to say something damaging to their (or their employer's) case, and who therefore cast around, usually visibly, for a less harmful answer. That lie may impact that witness' credibility, it may (depending on the circumstances) prejudice the overall outcome, but it is very unlikely to constitute grounds for an unreasonable behaviour costs award because it is not the reason for the cost being incurred.

Last, by Regulation 41 (2) of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2004, the Tribunal must have regard to the defaulting party's ability to pay when assessing any costs application. Substantial costs awards against individuals are consequently very hard to obtain, and a sensible employer will consider carefully whether any costs it might reasonably expect to recoup would even cover the costs of making the application for them in the first place. It is perhaps obvious that the same consideration is unlikely to apply in reverse, such as that an employer which deliberately lies in a crucial respect could legitimately expect quite a beating on the costs front.

It is possible that the Tribunals will, seeing this issue coming, be rather more circumspect about their factual conclusions and the degree of scepticism they express in relation to particularly iffy parts of the evidence. Always reluctant to state in terms that a witness is lying, we could expect more refuge to be taken in "balances of probability" etc. In *Daleside* a finding was made that the Respondent had not received any of a number of grievance letters alleged to have been sent by the Claimant. Though one might jump to certain conclusions in the circumstances, the Tribunal expressed no views as to whether they had in fact been sent, meaning that no costs application could be made in that respect.

Daleside is therefore probably wider than the EAT seems to wish, in the sense that once a lie is clearly established, it will now be hard for a Tribunal not to view this as unreasonable behaviour within the meaning of its own costs jurisdiction. However, there is still a fair step between that and any costs award once one takes into account issues of causation, misunderstanding, means to pay and costs to enforce.

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LENGTH OF SERVICE LAWFUL FOR REDUNDANCY SELECTION PURPOSES

Unite, the UK's largest trade union, has successfully defended its claim that length of service can lawfully be used for redundancy selection purposes despite the 2006 Age Regulations (*Rolls-Royce Plc v Unite the union*). It therefore seems that employers have little to fear from continuing to use length of service as one of a number of selection criteria in any redundancy exercise – pure "last in first out" on the other hand is likely to be very difficult to justify.

The Court of Appeal held (by a majority) that the inclusion of length of service as a redundancy selection criterion was justifiable, despite its indirectly discriminatory effect. The Court confirmed that within the redundancy selection criteria RR had a legitimate business objective in the form of rewarding loyalty and achieving a stable workforce and that the means of achieving that aim (i.e. including taking account of length of service) were proportionate because length of service was only one of six criteria used to measure suitability for redundancy and it was by no means determinative by itself.

FURTHER INFORMATION

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