Case Number: 1302027/2016

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	AND	**Respondent**
Miss E Hinneh		Methodist Homes

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Birmingham **ON** 20 July 2017

EMPLOYMENT JUDGE Dimbylow **MEMBERS** Mrs DP Hill
Mr PR Trigg

Representation

For the claimant: Not present or represented
For the respondent: Mr C Crow, Counsel

JUDGMENT

Upon the respondent's application for costs

The unanimous judgment of the tribunal is that: we consider that the claimant acted vexatiously, abusively and unreasonably in bringing and conducting these proceedings; and the claims had no reasonable prospect of success. Furthermore, we consider it to be just, fair and proportionate to make an order for costs, and we order the claimant to pay to the respondent costs assessed in the sum of £20,000.00.

REASONS

1. The claim. The history and background to this case is fully set out in our judgement (sent to the parties on 7 March 2017) and reasons (sent to the parties on 24 March 2017) and therefore there is no need for us to recite it all here. In short, the claimant was unsuccessful in all her claims for direct race discrimination, racial harassment and victimisation.

2. The issue. The respondent applied for a costs order against the claimant and the purpose of this hearing was to determine that application only. We gave directions for the just disposal of the application in an order sent to the parties with the judgment on 7 March 2017.

3.1 The law. This is to be found in the Employment Tribunal Rules of Procedure 2013, schedule 1, Rules 76 to 84, and we recite some of the main areas we considered:

When a costs order or a preparation time order may or shall be made

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.

(2) A Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party.

(3) Where in proceedings for unfair dismissal a final hearing is postponed or adjourned, the Tribunal shall order the respondent to pay the costs incurred as a result of the postponement or adjournment if—

(a) the claimant has expressed a wish to be reinstated or re-engaged which has been communicated to the respondent not less than 7 days before the hearing; and

(b) the postponement or adjournment of that hearing has been caused by the respondent's failure, without a special reason, to adduce reasonable evidence as to the availability of the job from which the claimant was dismissed or of comparable or suitable employment.

(4) A Tribunal may make a costs order of the kind described in rule 75(1)(b) where a party has paid a Tribunal fee in respect of a claim, employer's contract claim or application and that claim, counterclaim or application is decided in whole, or in part, in favour of that party.

(5) A Tribunal may make a costs order of the kind described in rule 75(1)(c) on the application of a party or the witness in question, or on its own initiative, where a witness has attended or has been ordered to attend to give oral evidence at a hearing.

The amount of a costs order

78

(1) A costs order may—

(a) order the paying party to pay the receiving party a specified amount, not exceeding £20,000, in respect of the costs of the receiving party;

(b) order the paying party to pay the receiving party the whole or a specified part of the costs of the receiving party, with the amount to be paid being determined, in England and Wales, by way of detailed assessment carried out either by a county court in accordance with the Civil Procedure Rules 1998, or by an Employment Judge applying the same principles; or, in Scotland, by way of taxation carried out either by the auditor of court in accordance with the Act of Sederunt (Fees of Solicitors in the Sheriff Court)(Amendment and Further Provisions) 1993, or by an Employment Judge applying the same principles;

(c) order the paying party to pay the receiving party a specified amount as reimbursement of all or part of a Tribunal fee paid by the receiving party;

(d) order the paying party to pay another party or a witness, as appropriate, a specified amount in respect of necessary and reasonably incurred expenses (of the kind described in rule 75(1)(c)); or

(e) if the paying party and the receiving party agree as to the amount payable, be made in that amount.

(2) Where the costs order includes an amount in respect of fees charged by a lay representative, for the purposes of the calculation of the order, the hourly rate applicable for the fees of the lay representative shall be no higher than the rate under rule 79(2).

(3) For the avoidance of doubt, the amount of a costs order under sub-paragraphs (b) to (e) of paragraph (1) may exceed £20,000.

Ability to pay

84

In deciding whether to make a costs, preparation time, or wasted costs order, and if so in 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.

As always, we had regard to Rule 2, which states:

Overriding objective

2

The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—

(a) ensuring that the parties are on an equal footing;

(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;

(c) avoiding unnecessary formality and seeking flexibility in the proceedings;

(d) avoiding delay, so far as compatible with proper consideration of the issues; and

(e) saving expense.

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.

3.2 We make some general points about dealing with an application for costs. The fundamental principle in the Employment Tribunal is that costs are the exception rather than the rule and costs do not normally follow the event. If the tribunal has to consider an application for a costs order, then it has to undertake a two-stage process. Firstly, the tribunal must be satisfied that the claim has been conducted in a manner falling within rule 76 (a) and/or (b). If it is so satisfied, then at the second stage the tribunal has to consider whether to make the order and in doing so may proceed to make the order if it thinks it is appropriate. As part of the second stage, if it is appropriate then the tribunal must consider the amount, and if the amount is above £20,000 the tribunal may order a detailed assessment, either here in the tribunal or in the County Court. We can undertake our own summary assessment of costs in the Employment Tribunal up to £20,000 if we consider that this properly compensates a party for the costs incurred because of the culpable conduct in question.

3.3 The purpose of a "no costs" regime in the Employment Tribunal is regarded as providing a more level playing field between employers who may be prosperous and employees who are less likely to be so in comparison. For that balance to be observed it seems to be the case that, for example, false or unwinnable claims are discouraged. This would be particularly so in relation to false claims; and where there was no available remedy, the no costs regime here would fall into disrepute. In the case before us, the claimant advanced serious allegations of discrimination, wherein the amount of compensation potentially recoverable is unlimited and reputational issues arise. False or exaggerated claims should be considered carefully. We remind ourselves that the object of any costs order, if made, must always be compensatory and not punitive.

3.4 We know that we have a further discretion, as we may have regard to the paying party's ability to pay. This is the case even if the tribunal orders a detailed assessment. Guidance has been given from previous cases encouraging tribunals to give their reasons for any decision whether or not to take ability to pay into account. We also have regard to the status of the claimant as a litigant,

and in this case, she was represented throughout by Dr R Ibakakombo, although he did not attend at today's hearing, and made written submissions instead.

3.5 When considering unreasonable conduct, we know that we do not have to dissect the case in detail and we are encouraged to look at the whole picture in the case and ask whether there has been unreasonable conduct by a party in bringing and conducting the case, and when doing this identify the conduct, stating what was unreasonable and what effects it had. This arises out of the case of Barnsley MBC v Yerrakalva [2011] EWCA Civ 1255.

3.6 When considering no reasonable prospect of success, we have to consider, amongst other things, the question of whether the claimant ought to have known that there was no supportive material for her case. There is some overlap with unreasonableness. We look at costs warnings that may have been given. The test we apply is an objective one and is not dependent on whether the claimant genuinely believed in the claim, this being taken from Vaughan v London Borough of Lewisham [2013] IRLR 713, EAT.

4. The evidence. We received documentary evidence which we marked as exhibits (continuing the sequence from the main hearing) as follows:

C4 claimant's submissions on costs
R8 respondent's skeleton argument on costs
R9 respondent's bundle of authorities comprising:
Mirikwe v Wilson & Co Solicitors & others UKEAT/0025/11/RN
Jilly v Birmingham & Solihull Mental Health NHS Trust & others UKEAT/0584/06
Vaughan v London Borough of Lewisham & others [2013] IRLR 713
Matthew v Daleside Nursing Home Ltd EAT 18 February 2009
Nicholson Highlandwear Limited v Nicholson [2010] IRLR 859
Power v Panasonic (UK) Ltd UKEAT/0439/04/RN
R10 respondent's bundle of documents (68 pages)

We received no written or oral evidence from the claimant in relation to her means. The claimant's submissions were silent on the subject; notwithstanding the order we had made at the end of the main hearing, when we directed that if the claimant wished the tribunal to have regard to her ability to pay, she should provide us with details of her: income, outgoings, assets and liabilities.

5. The submissions. Mr Crow spoke to his written submissions document and therefore there is no need for us to repeat everything he said here. We read carefully the claimant's submissions. They were not signed. We found that they were somewhat strange. In part, they purported to reopen some of the findings of fact that we had made. They incorporated arguments currently awaiting resolution before the EAT. They had the tone, in part, of being a request for a reconsideration of our judgement, although no such application was made. Bearing in mind the specific order we made on the subject, we found and

concluded that the claimant positively decided not to give her financial information to us.

6. Our conclusions and reasons. We apply the law to the facts. We acknowledge once again that an Employment Tribunal is generally a cost-free environment. Our starting point is that we are reluctant to make an award of costs. However, there are exceptions and a careful analysis is required before a decision is made. We reminded ourselves of our findings of fact and conclusions set out in our reasons. We saw that the claimant had admitted her own misconduct in relation to those matters which led to her dismissal. She told us that she made complaints of discrimination just to draw attention to herself. We made a finding that her claim and been made in bad faith. The claimant had lied to the respondent and the tribunal, with no thought of the consequences of her conduct. The claimant accused the respondent of fabricating evidence; but without any support for this assertion. The claimant held no genuine belief in the truthfulness and validity of her case; being driven by spite, wanting to be hurtful and potentially damaging towards the respondent, its staff and their reputations. We stood back and considered the case as a whole; and concluded the claimant's conduct was vexatious, abusive and unreasonable, both at the point of bringing the proceedings and then continuing with them. The claimant's conduct amounted to an abuse of the process of the tribunal, the effect of which was to cause the respondent and its employees inconvenience, harassment and expense in costs.

7. In carrying out our analysis at this stage, perusing our detailed findings, we concluded that the claimant had no reasonable prospect of success in any of her claims, which were false from the beginning. We noted that the respondent's solicitors wrote to the claimant a costs warning letter (at pages 45-47 in the bundle R10), dated 7 February 2017, shortly before the beginning of the trial which started on 27 February 2017. The letter accurately predicted the outcome of the case. It was fair and balanced. Unfortunately, the claimant and her representative did not engage with it and carried on regardless, taking no notice of it.

8. In relation to the claimant's means, we know from the main hearing, that she obtained other work after being dismissed by the respondent. She is 44 years of age and has over 20 years of working life ahead of her. It is difficult for the tribunal to assess ability to pay, or lack of it, when the claimant has failed to cooperate with the process. The claimant was present when we made the order on directions in relation to this hearing on 3 March 2017. Our order was confirmed in writing. The claimant has chosen not to attend today; and we quote from her submissions as follows: "….the claimant does not wish to participate in the hearing today." We know, of course, that should the respondent take any enforcement proceedings, the claimant's means and financial circumstances will be taken into account.

9. Once we had decided that the first stage of the test was met, we then proceeded to the second stage. Here, we considered that it was appropriate to make an order, because it was just, fair and proportionate to do so, and we ordered the claimant to pay the respondent assessed costs.

10. The total of the costs amounted to the sum of £28,875.13, plus the cost of and occasioned by the hearing today. However, the respondent was prepared to limit the application for costs to the sum of £20,000.00. We considered the grades of fee earner employed in the case and the rates of charge applicable to them. We also considered counsel's fees, bearing in mind that Mr Crow has been called for some 17 years. We had regard to the volume of work undertaken and took into account the complexity and seriousness of the allegations. We concluded that the sum of £20,000.00 was a sum which was fair and reflected the work involved in defending this claim, including a five-day hearing.

11. The claimant's conduct in bringing and conducting this unwarranted case caused the respondent to have to spend a considerable sum of money in defending itself. Such expenditure was caused entirely by the claimant and it is just, fair and proportionate that she is ordered to pay costs assessed in the sum of £20,000 to the respondent.

12. We accepted and adopted the submissions of Mr Crow, which we found very helpful, being fair, reasonable, succinct and on point.

13. At the end, Mr Crow applied for full written reasons, and whilst he had made a note, bearing in the mind that there are proceedings outstanding in the EAT, this seemed a sensible thing to do, although we have no doubt that Dr Ibakakombo would have asked for written reasons in any event.

Signed by _____on 27 July 2017
Employment Judge Dimbylow

Decision sent to Parties on

_27 July 2017_____

__Shareen Brown_____