



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

and

Respondent

Mrs Anne-Marie Askew

Dr C Engelbrecht t/a Apsley Dental
Practice

7 February 2017

Employment Judge Southam

COSTS JUDGMENT

The respondent is ordered to pay to the claimant the sum of £420.00 in respect of costs incurred by the claimant in relation to the preliminary hearing on 15 November 2016.

REASONS

1. I conducted a preliminary hearing in these proceedings on 15 November, 2016. That was to have been the date of a one-day hearing of the claimant's claim about unfair dismissal. There was an application by the respondent to stay the proceedings and another employment judge agreed to, in effect, postpone the full merits hearing and to allow the question of whether or not there should be a stay of proceedings to be determined on the day of that one-day full-merits hearing. I rejected the application for the stay of proceedings and my reasons are set out at paragraphs 10-14 of the notes of the case management hearing I conducted that day, sent to the parties on 23 November, 2016.
2. That prompted an application, on 29 November, by the claimant for costs of the preliminary hearing, restricted to the amount of Counsel's fee for representing the claimant that day, the sum of £420 including VAT. The application was made on the basis that I would consider the application on the basis of written representations without the need for a hearing, so as to save further costs.

3. Although they did not say so specifically, the respondent, when submitting representations in writing on the application, on 7 December, 2016, appeared to agree that the matter should be determined on paper in effect, without a hearing. I am sorry for the delay in considering this application until now.
4. The basis of the application was that by applying for a stay of proceedings, the respondent had conducted the proceedings unreasonably and the application itself, a stay, had no reasonable prospect of success.
5. The application might have been, but was not, made on the basis of rule 76(2), which states that a tribunal may make a costs order where a hearing has been postponed or adjourned on the application of a party.
6. In relation to applications under rule 76(1), the rule under which the application was made, the basis for a costs order includes unreasonable conduct of the proceedings. That rule does not envisage the making of a costs order where an application is regarded as having had no reasonable prospects of success. "Prospects of success" refer to a claim or response. There is no suggestion that, in making the application, the respondent's representative acted vexatiously, abusively or disruptively.
7. Arguably, the test in an application under rule 76(2) is less stringent, but the rule itself is silent about the circumstances in which an order could be made following the postponement of a hearing. There is no requirement for there to have been unreasonable conduct of the proceedings. The rule merely envisages that a judge may exercise the power to order payment of costs where there has been a postponement.
8. By not relying on rule 76(2), the claimant has set for herself a higher test to be satisfied, in my judgment. The test is therefore whether, by making the application for a stay of proceedings, the respondent's representative acted unreasonably in the conduct of the proceedings.
9. I remind myself that the application was put in a way that suggested that the respondent was herself neutral on the question of whether or not there was a stay. The concern was expressed was that a forensic report in relation to the activities of another employee of the business, Mr Bowen-Davies, may have to be disclosed to the claimant in these proceedings and, if it were, it could find its way into the hands of Mr Bowen-Davies before the completion of a police investigation into his activities. The concern expressed was therefore in relation to maintaining the integrity of a police investigation, which had stalled because of the illness of the police officer involved. The motive for the application was almost altruistic.
10. On analysis, the circumstances did not meet the fairly strict requirements of the case law that was put before me. I refused the application for those reasons.
11. The question raised by the costs application is whether it was unreasonable on the part of the respondent's representative to cause the

full merits hearing to be delayed by the making of an application that proved to be unsuccessful.

12. There were no other proceedings. The respondent's altruistic concern was that a police investigation might be hampered if Mr Bowen-Davies were to get advance disclosure, in effect, of the forensic report which, I noted, the respondent had chosen not to disclose to the claimant in these proceedings. I noted that the issue in these proceedings would be the extent to which the respondent reasonably perceived the claimant to have been complicit in any perceived wrongdoing on the part of Mr Bowen-Davies. Whether Mr Bowen-Davies was in fact guilty of unlawful conduct was a separate issue, and not a matter to be determined by the employment tribunal.
13. I have come to the conclusion that it was unreasonable for the respondent to make the application and thereby delay the full merits hearing. The application was certain to delay the proceedings. It seems to me that any concern about the forensic report could have been addressed, if there had been on the part of the claimant an application for specific disclosure of that report. Sgt McCulloch had recovered from his illness and the respondent was due to see him that week. If there was such an application, he could be consulted about whether or not the disclosure of the report was likely to hinder his investigation into Mr Bowen-Davies' activities.
14. It was therefore unreasonable for the respondent to pursue an application that it could have been seen was likely to fail. I order her to pay the costs sought by the claimant which, as indicated above, are limited to the sum of £420, which includes VAT.

Employment Judge Southam

Date: 16/02/2017

JUDGMENT SENT TO THE PARTIES ON:

.....
FOR THE TRIBUNAL OFFICE