



EMPLOYMENT TRIBUNALS

Claimant: Mr Nazmul Hussein

Respondent: Westminster Bangladeshi Welfare Trust

Before Judge: Employment Judge Davidson

DECISION

The Respondent's application for costs is dismissed.

The tribunal is minded to agree to the Claimant's application for costs but the Respondent has an opportunity to make representations before such an order is made.

Employment Judge Davidson

Date 4 September 2017

REASONS

1. This is an application by the Respondent for its costs following the outcome of the full merits hearing which took place in February, March and April 2017, with the Decision being sent to the parties on 4 May 2017. Representations have been made in support of the application by the Respondent's solicitors, Hafiz & Haque by letter dated 27 July 2017. The tribunal invited representations from the Claimant and these have been made on his behalf by Oliver Isaacs of Counsel, dated 8 August 2017. Both parties indicated that the matter could be considered on the papers without a hearing.

2. The issues have been considered by the Employment Judge alone.

Respondent's application

3. The grounds on which the application is based are

3.1. that the claim had no reasonable prospect of success and was a hopeless case, and

3.2. that the Claimant acted unreasonably in rejecting offers of settlement.

4. The Respondent refers to the 2004 Rules. These have been replaced by the 2013 Rules and I will deal with this application in accordance with those rules.

Hopeless Case

5. The Respondent relies on the outcome of the hearing, in which the Claimant's claim for automatic unfair dismissal for having made protected disclosures was dismissed, concluding that the Claimant should never have made such claims, which were ultimately unsuccessful.

6. The Respondent also relies on the original claim formulated by the Claimant which was subsequently cut down to the whistleblowing claims following a case management discussion before Employment Judge Wade as evidence that the Claimant was pursuing unrealistic claims.

Offers of settlement

7. The Respondent also submits that the Claimant was unreasonable in refusing offers of settlement which comprised a 'drop hands' offer and an offer to be allowed to withdraw on payment of the Respondent's costs of £3,000 plus VAT.

Claimant's response

8. The Claimant resists the application on the following grounds.

Out of time

9. The application is out of time. The time limit for such an application is 28 days from the date the judgment is sent to the parties and, in this case, the time limit expired on 1 June 2017. The application was not made until 27 July 2017.

Hopeless case

10. The tribunal's decision does not support the Respondent's position that the claim had no reasonable prospect of success: the tribunal accepted that protected disclosures had been made but found that the totality of the communications with Jacqui Wilkinson, not just the protected disclosures, was the reason for dismissal. Further, the tribunal was critical of the Respondent's conduct.
11. There is a distinction between a claim not succeeding and the claim having no reasonable prospect of success. There is nothing in the tribunal's decision to support the view that the claim had no reasonable prospect of success.

Offers of settlement

12. The 'offers' relied on by the Respondent were not offers capable of acceptance and, in any event, amounted to 'drop hands' or payment of some of the Respondent's costs. The offer provided no financial or other benefit and the Claimant was entitled to ask the tribunal to determine the claim.

Costs of application

13. The Claimant contends that the application itself is misconceived and requests its costs in defending the application.

Law

14. The relevant law is contained in Rules 75 – 78 of the Employment Tribunal Rules of Procedure 2013 and can be summarised as follows.
15. A tribunal may make a costs award if it considers that
 - 15.1. a party has acted vexatiously, abusively, disruptively or otherwise unreasonably in either bringing the proceedings or in the way that the proceedings have been conducted or
 - 15.2. if the claim (or response) had no reasonable prospect of success.
16. The application must be made within 28 days of the final judgment being sent to the parties.

Decision

17. I find that the application was made out of time. No explanation has been given for the delay and no application to extend time was included with the application. I therefore find that the claim fails on the time point alone.

18. If I am wrong about the time point, I would still reject the application on the following grounds:

18.1. a claim that is unsuccessful does not mean that it is a claim which should never have been brought. Costs in the employment tribunal are the exception rather than the rule and therefore the facts would have to be exceptional for such an award to be made. The findings of the tribunal at the hearing include findings relating to the Respondent's own conduct and the main finding that the reason for dismissal was the totality of the disclosures by the Claimant. The Claimant was unsuccessful because the tribunal found that the dismissal could not be attributed to the two disclosures relied on by the Claimant. This is not the same as finding that the claim had no merit whatsoever.

18.2. The fact that the original claim was more wide-ranging than the final claim is not a ground for concluding that the whole claim should not have been brought. The purpose of the case management discussion is to identify those parts of the claim which should proceed. The Respondent is unlikely to have incurred substantial costs in relation to those parts of the claim which did not proceed as these were identified at an early stage.

18.3. In order for costs to be awarded for failing to accept an offer, the party must be acting unreasonably in rejecting the offer. It is arguable that a claimant is, in any event, entitled to the finding of unfairness that they seek by bringing the claim and so an offer without admission of liability could be rejected without the party being unreasonable. In this case, the offer of 'drop hands' or the later offer that the Claimant pay towards the Respondent's costs are not, in my view, offers which a party can be unreasonable in refusing. If the Respondent had offered a significant financial settlement, the equation on reasonableness of rejecting such an offer may be different. However, on these facts, it was not, in my view, unreasonable for the Claimant not to engage in settlement on those terms.

19. In the light of my decision, I have not analysed the costs schedule or the Claimant's representations on that schedule.

20. The Claimant has requested the sum of £750 in respect of his costs in defending this costs application. In the light of the time point alone, I am minded to allow this. This view is strengthened by the arguments in favour of costs which I believe had no prospect of success. I therefore invite the

Respondent to make any representations in relation to this counter-application within 14 days of receiving this Decision.

Conclusion

21. In conclusion, the Respondent's application for costs is dismissed. The Respondent is invited to make representations in relation to the Claimant's application for his costs in responding to this application.

Employment Judge Davidson

Date 4 September 2017