



EMPLOYMENT TRIBUNALS

Claimant: Miss K Patel

Respondent: CDS Global

Heard at: Leicester **On:** Friday 10 August 2018

Before: Employment Judge Hutchinson (Sitting alone)

Representatives

Claimant: In person

Respondent: Ian Lewis Solicitor

RESERVED JUDGMENT

The application for costs by the Respondent fails and is dismissed.

REASONS

Background to this hearing

1. The Claimant had originally presented her claims to the Tribunal on 7 December 2015. She had been employed by the Respondent as a Junior Business Intelligence Developer/Data Developer between 5 April 2010 and 25 June 2015. Her claims were of;

- Sex discrimination
- Equal pay
- Redundancy pay
- Breach of contract
- Wages

2. At the hearing before my colleague, Employment Judge Solomons on 21 to 25 November 2016, the Claimant's claims for equal pay were dismissed.

3. The Claimant then submitted an appeal against that decision to the Employment Appeal Tribunal which then dismissed her appeal.

4. The remainder of the Claimant's claims of;

- Breach of contract
- Sex discrimination
- Redundancy pay
- Wages

Were withdrawn by the Claimant on 14 January 2018. She said that the proceedings had affected her health and her professional life. She was also concerned about the health of a member of her family. She said that it was not a decision she had taken lightly. A judgment dismissing the claims was signed by my colleague Regional Employment Judge Swann and sent to the parties on 28 March 2018.

5. The Respondent had made an application for Costs by way of a letter dated 6 February 2018 and in response to that, the Claimant informed the Tribunal on 8 February 2018 that she would be submitting a cost claim with regards to the equal pay case and for work done and fees paid in regard to the withdrawal cases. However, no such claim has ever been received.

6. At a telephone hearing which I conducted on 11 June 2018, I was mistakenly under the impression that the Claimant had applied for an Order for costs. The Claimant has never made such an application.

7. As we agreed at the start of the hearing, in respect of the Respondents claim for costs, this involves a 2-stage process.

The Respondents say that there should be an award for costs because;

7.1 The Claimant was unreasonable in bringing the proceedings

7.2 The Claimant conducted the proceedings unreasonably.

7.3 The claims had no reasonable prospect of success.

8. If I am so satisfied then I must decide whether to exercise my discretion and to award costs.

9. It is also agreed that in deciding whether to award costs and if so, how much, I may take into account the Claimant's financial circumstances.

The hearing today

10. At the commencement of the hearing, I offered to the Claimant the opportunity to record the proceedings bearing in mind her dyslexia, although she did have a friend, Martin Jacques who was attending with her to assist her by taking notes. Mr Lewis did not have any objection to the proceedings being recorded.

11. We first dealt with the issue of whether the Claimant had made an application for costs. I was satisfied that the Claimant had not made any application for costs in this case. I looked at the correspondence on the file and the first mention of the Claimant wishing to proceed with a claim for costs is in her letter to the Tribunal of the 8 February 2018. This was clearly in response to the email/letter that she had received on 6 February 2018 from the Respondent's

solicitor. That letter was also sent to the Tribunal. That letter said that the Respondents were making an application for costs under Rule 76 of the Employment Tribunals Rules of Procedure and that the matter should be listed for a hearing at which the Tribunal could consider a cost application by the Respondents against the Claimant. I am satisfied that the Claimant's email was very much sent in response to that. It says;

"Hi, I will also be submitting a cost claim in regard to the equal pay case and for work done and fees paid in regard to withdrawal cases. The cost claim will include all of this, but will not necessarily be limited to these.

Thanks

Kashmira"

12. It can be seen from the note that it did not amount to an application for costs itself, simply an indication that she would be submitting a claim. It does not set out any grounds for making such a claim and although I have examined the subsequent correspondence carefully, at no stage did the Claimant ever make any application.

13. I therefore explained to the Claimant that having satisfied myself that no application for a preparation time order and costs had been made, I would not be considering any application at this stage. An application for costs must be made within 28 days after the date on which judgment finally determining the proceedings in respect of that party was sent to the parties. Any such application is now well out of time.

14. In doing so, I acknowledged that both myself at the Preliminary Hearing on 11 June 2018 and my colleague, Employment Judge Heap, had both referred to her making a claim for costs, when in fact she had not made any such application.

The Respondent's application for costs

15. The basis of the application for costs by the Respondent is set out in their letter of 6 February 2018. Mr Lewis had produced a bundle of documents and took me through what had happened leading up to the hearing at which the Claimant's claims of equal pay had been dismissed. Where I refer to page numbers it is from that bundle. He particularly highlighted the following matters in respect of the Judgment and reasons of Employment Judge Solomons (Pages 1-9).

15.1 In paragraph 10 of the Judgment, Judge Solomons said as follows; "It is import to note that I have found Miss Nagaraja to be an honest and balanced witness whose evidence was reliable. Equally, it is important to note that I cannot make the same comment about the Claimant. Repeatedly, in the course of her evidence, the Claimant was not balancing the way in which she sought to compare her experience and abilities with that of her comparators."

15.2 Later in the same paragraph, he went on to refer to the Claimant's unrealistic view of the comparison between herself and her comparators and finishes this paragraph by saying "This further example of a lack of

realism on the part of the Claimant, does not assist her case and renders her evidence unreliable”.

15.3 In paragraph 13 he referred to the Claimant’s comparison with Mr Ratanayake. He refers to her perception of how she worked and conflates her ad hoc assistance with his and others’ tasks as equivalent to her doing it.

15.4 In paragraph 15 he refers to; “Her appreciation of her own skill is in my view unreliable”.

15.5 In paragraph 16 he refers to “The Claimant is making inaccurate comparisons and has a self-belief that she was more competent and capable at fulfilling her role than she actually was”.

15.6 In paragraph 17 he talks again about Mr Ratanayake and that he was the only comparator where she was compared to concede that two of his skills were better than hers. He says;

“All other skills between all of the 3 comparators set out in the document beginning at 1416 in respect of those she refused to countenance that she was worse than them in any respect. That is wholly without foundation in my view upon the evidence”.

15.7 In paragraphs 19 and 21 he concluded that the Respondents on the balance probabilities had established material factors for the difference in the pay between the Claimant and Mr Ratanayake and found that they were not tainted by sex discrimination in any way.

15.8 He then went on to discuss the comparator Peter Matthews in paragraphs 22-23 and said that Mr Matthews had been appointed to a more senior job than that of the Claimant at the time and said, “it is clear upon the evidence that over time his and the Claimant’s duties, skills and responsibilities did not coalesce”.

15.9 Similarly, in respect of Matthew Orpin at paragraph 24, he had no difficulty in finding that the Respondents had proved that five material factors existed and were causative of the extra pay which he received as compared to the Claimant. He was satisfied that the Respondents account was in no way tainted by sex discrimination.

15.10 Similar comments were finally made in paragraph 25 in respect of Shelton Masuku.

16. Mr Lewis points out that the Respondents had made a previous application for a strike out/deposit order and this had been considered by Employment Judge Ahmed on 7 October 2016. This was prior to the hearing conducted by Employment Judge Solomons. Mr Lewis says that this put the Claimant on warning that her claim had no reasonable prospect of success.

17. In paragraph 7 of the Case Management Summary, Employment Judge Ahmed said “I have explained that the Tribunal will consider the items set out in the agenda at paragraph 6.1 onwards of the Order made on 16 June 2016. I have also explained that if the Respondent is able to establish a valid material factor difference then the Claimant’s complaints of equal pay are likely to be

dismissed but if that defence is not established or fails, the Tribunal will need to go on to consider the remaining items in the Order”.

18. After that hearing Mr Lewis wrote a letter to the Claimant on 13 October 2016. This letter related to several matters. It referred to the Claimant’s conduct in sending to the Respondents a huge number of emails with attachments. He described that over the course of three days he had received 123 emails with a huge number of attachments and pages. Five lever arch files of evidence were produced. He went on to say that he would be writing separately to the Claimant in respect of a cost warning because he said;

“your claims cannot possibly succeed because although at times you may have been doing work similar to your comparators, the fact is that the law is perfectly clear. If your comparators have additional responsibilities, expertise, skills, seniority and/or management responsibilities then these take their job comparison beyond yours and cannot be considered for an equal pay claim.

I would remind you of the warning that you received from Judge Ahmed that if the Tribunal wastes the time discussing and considering comparators where there is clearly no hope of you succeeding, then costs could be awarded against you. It remains our case that it applies to all the comparators and if nothing else is clear from the documentation being both the job description and the PDR’s. Indeed your own documentation indicates that you were subject to the management responsibilities of your comparators”.

19. Mr Lewis then sent the Claimant a letter of 21 October 2016 (pages 21-23). It is headed “**COSTS WARNING**” and referred to the letter of the 13 October 2016.

20. The letter went into a great deal of detail about why the Claimant would not succeed with her claim of equal pay. It referred to case law that was relevant and the evidence that the Tribunal would hear. He set out in that letter his warning that costs could be made under Rule 76 of the Employment Tribunal Rules against the Claimant if she continued to pursue a claim which he felt had no reasonable prospect of success. He urged the Claimant to take heed of the warning given by Judge Ahmed about possible Cost Orders and said that she should take independent legal advice on the strength of the case and what the cost warning could mean to the Claimant personally. He reserved the right to bring the letter to the attention of the Tribunal on the question of costs.

21. Following receipt of Employment Judge Solomons Judgment and Reasons on 31 May 2017, Mr Lewis wrote again to the Claimant on 2 June 2017 (pages 24-25). In that letter he pointed out that the Claimant had been warned on many occasions that her claim for equal pay would fail on all counts and that she had received a costs warning. He also pointed out that the Judge had been critical of the way she had presented her case.

22. He said that as the claims had failed entirely and because of the comments made by the Judge, it was his intention to pursue costs which would be in the region of “£20,000 plus”. In the final paragraph of that letter he said;

“We should remind you that a costs claim can succeed in whole or in part, but the costs incurred for each of your comparators is several thousand

pounds. The company will consider dropping its costs claim provided you now drop all further claims. We urge you to take appropriate legal advice”.

23. On 22 June 2017 Mr Lewis wrote to the Tribunal to say that he intended to pursue costs on behalf of the Respondent under Rule 76 on the basis that the Claimant had acted unreasonably in bringing the proceedings, in the way that the proceedings have been conducted and/or the claim had reasonable prospect of success”.

24. The Claimant subsequently withdrew her claims by a letter of 14 January 2018. A Judgment was then issued dismissing the claims and then followed the correspondence from the Respondents saying they wish to pursue costs.

25. Mr Lewis makes it clear that he is only claiming costs for the hearing up until November 2016 and does not pursue costs thereafter.

The costs schedule

26. I have seen the costs schedule prepared by Mr Lewis and I note that the costs claimed are only up until the hearing in November 2016.

27. Counsels fees for the hearing in November which comprised a brief fee and included the cost of attending 5 days at the hearing amounted to some £6,000 plus VAT. Mr Joseph Neville Counsel for the Respondent was of 12-year call and the brief fee is eminently reasonable.

28. I can see from the schedule of costs, in particular page 28 of the summary, the total cost incurred were some £16,875 plus VAT. The sum calculated to 26 November 2016 amount to some £13,465 plus VAT.

29. The Respondents limit their claim for costs to £5,000.

The Claimant's financial circumstances

30. I heard evidence from the Claimant about her circumstances. She lives with her mother and brother in rented accommodation and her mother is the tenant of the property. She has lived there now for 24 years.

31. After she left the Respondent's employment she was unemployed for a period of 6 months and then obtained employment as a Systems Analyst for a company called Agco and worked there for 18 months earning £28,000 per annum.

32. She left that employment because she was suffering from stress and the pressures of work and the Tribunal proceedings and having to travel to Coventry each day.

33. After she left there she obtained employment at Gateway College for a period of 6 months, again in a similar position but has been unemployed since April 2018 and has applied for Universal Credit. At this stage she has no earnings and although she has applied for Universal Credit, she has no income at all.

34. She has savings of £6,000 but does not know when she will get another job. Looking for employment also means she will have to pay for travel for interviews.

The Law

35. The claim for costs is made under Rule 74 of the Employment Tribunal Rules of Procedure 2013. Rule 76 deals with when a Costs Order may be made. It says;

“(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 (or part) have been conducted; or

(b) any claim or response had no reasonable prospect of success”

36. Rule 84 deals with ability to pay. It says;

“In deciding whether to make a Costs Order, Costs, Preparation Time, or Wasted Costs Order, and if so in what amount, the Tribunal may have regard to the paying parties (or, where a Wasted Costs Order is made, the representatives) ability to pay.

37. There are several matters that I need to take into account when considering the issue of costs but the fundamental principle remains that Costs Orders are the exception rather than the rule. I referred myself to the case of **Yerrakalba -v- Barnsley Metropolitan Borough Council 2012 ICR4201B**. A range of circumstances in which are costs are ordered in the Employment Tribunal is much narrower than in Civil Courts where costs are said to “follow the event”. I am satisfied in this case that the factors are;

- The Claimants ability to pay
- The warnings given
- Legal advice and representation
- The timing of the withdrawal

38. Another case I referred myself to was that of **E T Marler Limited v Robertson 1974 ICR 72**. That case is an old case and the statement made by Sir Hugh Griffiths is still relevant today;

“Ordinary experience of life frequently teaches us that that which is plain for all to see once the dust of battle has subsided was far from clear to the combatants”.

My conclusions

39. I am particularly mindful that I did not hear this case when it came to be heard in November 2016. It was dealt with by the now retired Employment Judge Solomons. That does put me at some disadvantage. I take on board, as

Mr Lewis has described to me, the various comments that Employment Judge Solomons made about the credibility of the evidence of the Claimant who advanced her case before him. I am satisfied that the fact that the Claimant lost the argument does not mean to say that her claim had no reasonable prospect of success from the start or that she had acted unreasonably in pursuing it.

40. Whilst I take on board what Mr Lewis says about the Judgment, I am not satisfied that I should make an award for costs in their favour. The fact that Employment Judge Solomons made strong findings of fact and made comments about the Claimant's credibility as a witness does not mean, in my view, that I should award costs.

41. Mr Lewis acknowledges that even if I made an award of costs, it would only amount to a small contribution to the overall costs that the Respondents have incurred in defending this case.

42. The Claimant did not have the benefit of legal advice or legal representation at the hearing.

43. The Claimant, although belatedly, did withdraw the rest of her claims after receiving the second costs warning letter on 2 June 2017.

44. The case has now gone on for some 3 years or more and in my view, it should be ended and both parties should be able to move on from a case that has been fought and now lost by the Claimant.

45. The Claimant has suffered greatly with regards to her health and has only limited financial resources to pay any award for costs. She is currently unemployed and has no immediate prospects of employment.

46. I am not satisfied that the claim had no reasonable prospect of success or that the Claimant brought and pursued the claim unreasonably. In any event, in the circumstances of this case and in particular because of the reasons outlined above effect and especially the effect of these long running proceedings on the Claimant's health I am satisfied that I should not exercise my discretion in awarding the costs of the Respondent against the Claimant in any event.

47. For these reasons the claim of costs fails and is dismissed.

Employment Judge Hutchinson

Dated 25 September 2018

JUDGMENT SENT TO THE PARTIES ON

FOR THE TRIBUNAL OFFICE