Case Number: 3400025/2015
3400026/2015

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss M Davis-Bol	**v**	(1) Brook Street (UK) Limited (2) Secretary of State for Justice

Heard at:		
	Huntingdon	**On**: 10 August 2018
	Bury St Edmunds (no parties in attendance)	29 October 2018
	Bury St Edmunds	30 & 31 October 2018
	Bury St Edmunds	24 January 2019
	Cambridge (no parties in attendance)	20 February 2019

Before: Employment Judge Ord

Members: Mr D Sutton and Mr T Chinnery

Appearances
For the Claimant: In person
For the First Respondent: Ms N Owen, Counsel
For the Second Respondent: Mr T Kirk, Counsel

JUDGMENT ON COSTS

1. No Order is made on the first respondent's application for costs.

2. No Order is made on the second respondent's application for costs.

REASONS

1. The claimant instituted proceedings on 7 January 2015 against each of the first and second respondent by claims numbered 3400025/2015 and 3400026/2015 which preceded together under the number 3400025/2015.

2. Between 20 May 2014 and 28 November 2014, the claimant was employed by the first respondent. Between 20 May 2014 and 21 August 2014, she worked on assignment for the second respondent based at Northampton Magistrate's Court.

3. The precise claims which the claimant brought were ill-defined and not finally clarified until very late in the process. The Full Merits Hearing began in January 2017, was adjourned until May 2017 and in total lasted seven days. Tribunal deliberations took a further five days and the Judgment was finally issued on 15 December 2017.

4. In that judgment the claimant's claims against the first respondent failed on their merits. The claims against the second respondent were dismissed because they were presented out of time, other than one final allegation against the second respondent which failed on its merits.

5. Both respondents made application for costs. The second respondent's application was made on 12 January 2018, the first respondents on 17 January 2018.

6. On the face of it, the first respondent's application for costs is made out of time but it was accompanied by an application to extend time. The first respondent had, inadvertently, been missed from the distribution list for the Judgment when the Tribunal Administration issued the Judgment on the Full Merits Hearing. The letter sending the Judgment was properly addressed to the claimant and the second respondent, but not the first respondent. The first respondent only received the Judgment when a copy was sent to them by the second respondent on 5 January 2018. In those circumstances the first respondent's application was allowed to proceed.

The Basis of Each of the Applications

7. The first respondent's written application for Costs was made pursuant to Rule 76 on the basis that the claimant had acted unreasonably in the bringing of the proceedings and the way that the proceedings had been conducted and because the claimant's claim had no reasonable prospect of success.

8. The first respondent reminds us that when making a Costs Order on the grounds of unreasonable conduct, the Tribunal's discretion is not fettered by any requirement to demonstrate a cause or a link between specific costs and particular conduct (McPherson v BNP Paribas (London) [2004] EWCA Civ 569, but rather as stated in Barnsley Metropolitan Borough Council v Yerrakalva [2011] EWCA Civ 1255, the vital point is to look at the whole picture of what happened in the case and ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had.

9. The first respondent identified a 'starting point' in paragraph 45 of the Judgment following the Full Merits Hearing which said,
"There may be grounds for a finding under Rule 76(1)(a)".

10. It is appropriate to set out the whole of that paragraph of the Judgment as follows:

    "We dismiss these claims in their entirety. For the purposes of Rule 76(a) which imposes upon us a mandatory duty to consider costs in cases which satisfy the relevant criteria, we are satisfied that: sub-section (b) is made out and that these complaints had no reasonable prospect of success. We recognise (but as we have not heard from the parties on the point, do not determine) that there may be grounds for a finding under sub-section (a). There is presently no application for costs before us and thus we make no order at this juncture."

11. Sub-section (a) of Rule 76(1) requires the Tribunal to make a Costs Order or Preparation for Time Order and shall consider whether to do so, where it considers that 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.

12. Under Rule 76(1)(b) the same consideration is to take place where any claim or response had no reasonable prospect of success.

13. The Employment Judge who signed that Judgment, EJ Moore, has subsequently retired. I now sit with the same two non-legal Members of that original Tribunal and have spoken to those Members about the finding in paragraph 45 of that original judgment. They both confirm and state that that finding was made only as a consequence of how the evidence emerged during the course of the hearing.

14. It is relevant to note that the respondents had made an application to strike out the claimant's complaints. Those applications were heard by Employment Judge Bloom on 22 June 2015. At that time the Employment Judge made considerable effort to ascertain the precise allegations which the claimant (at that time unrepresented) was making and they are set out at length in the Judgment which he gave.

15. He did not, however, strike out any of the relevant complaints, nor did he consider that they had little reasonable prospect of success so that he might consider the making of a Deposit Order or Orders.

16. The first respondent's application for costs identified the fact that despite numerous opportunities to do so, the claimant did not sufficiently plead or particularise her case so that in paragraph 1 of the Reasons for the Judgment on the Full Merits Hearing, it was said that there were

    "some 50 or so pages of particulars which despite their length have not proved helpful in defining the issues. …subsequent service of particulars by the claimant appears to have obscured rather than clarified the issues".

17. The first respondent accepts, however, that at the hearing in April 2016 (the first listing of the Final Hearing which was aborted), revised draft particulars were put forward and agreed between the parties (save and except for one issue of an alleged protected disclosure).

18. The allegations made against the first respondent were that:

    18.1 They had failed to take any action to investigate allegations of racial harassment by staff of the second respondent and had failed to offer the claimant any support in relation thereto (said to be acts of harassment contrary to s.26 of the Equality Act 2010);

    18.2 Subjecting the claimant to detriment or dismissal for having made protected disclosures when they:

        18.2.1 decided to end the claimant's assessment with the second respondent and failed to find her new employment;

        18.2.2 failed to deal with the claimant's complaints adequately or at all, both before and after 21 August 2014; and

        18.2.3 dismissing the claimant following her making of a protected disclosure;

    18.3 Not finding the claimant another assignment following 21 August 2014 and failing to consider the claimant's complaint of race discrimination properly, or at all (said to be acts of direct discrimination on the protected characteristic of race contrary to s.13 of the Equality Act 2010.

19. The claimant also was warned by the first respondent prior to the Final Hearing beginning on 16 January, that the first respondent would seek a Costs Order should the claimant continue to pursue her claims against it. The first respondent says the claimant acted unreasonably in refusing to accept the first respondent's offer to make no application of costs in the event that the claimant withdrew her claims.

20. The first respondent also complains that the claimant applied to admit documents which were said to be transcripts of covert recordings which were partial and inaccurate. They were not admitted into the Bundle for the Hearing because in the words of the Judgement it was,

    "self evident from the documents… that they were not in fact pure transcripts at all. They were heavily adulterated with the claimant's own comments"

    Further, they were not mentioned in the claimant's witness statement and the respondents were not aware that reliance was being placed upon

them. The claimant was not precluded from putting in actual and unadulterated part of the recorded conversation to a witness in cross examination to rebut a point or points made by them in their evidence.

21. The first respondent says that this application for documents,

"Took a not insubstantial amount of [the first respondent's] time both in the consideration of this evidence, preparation for the final hearing, and in the final hearing itself (in resisting the application).

22. In fact, if these matters were *"self-evidently"* not transcripts as is set out in the Judgment and if they were documents which the respondents were not aware the claimant was relying upon, we unanimously failed to understand how a "not insubstantial amount of time" was spent preparing to deal with them.

23. The first respondent states that the claimant's witness statement did not address several key issues of fact, in particular did not address the issue of when she was dismissed or deal with her dismissal at all and nor did it offer any explanation as to why she thought the first respondent's behaviour was connected to either race or protected disclosures.

24. The first respondent points out that the claimant was represented at the time witness statements were exchanged and she could in any event have applied to amend or supplement her statement but did not do so.

25. The first respondent also refers to paragraph 9 of the Judgment where the Tribunal records its having developed concerns about the reliability of the claimant's evidence and found her to be evasive during cross examination, giving evidence which conflicted with both her own evidence in chief and answers given in different periods of cross examination. The Judgment affords the claimant's evidence as being markedly unreliable,

"far beyond the situation where the passage of time has affected memory on small points of detail".

26. For those reasons the first respondent says that the claimant's conduct during the hearing was unreasonable.

27. The first respondent also seeks to rely upon the conduct of the claimant's representative (a pro-bono representative) who did not put to the first respondent's witnesses that the motivational cause behind the alleged detriments was either the claimant's race or her alleged protected disclosures. It is right that unreasonable conduct by a representative will not automatically be laid at the door of their client, but this can be the case where a representative does not act for profit. In those circumstances a wasted costs order cannot be made against a representative and therefore an order can be made against the party.

28. The first respondent said that the claimant's claims had no reasonable prospect of success and that the claimant knew or had taken to have known that her claim lacked merit.

29. The respondent points out that the Judgment contains a specific reference in paragraph 45 that the complaints had no reasonable prospect of success.

30. The claimant was, throughout a substantial part of the case, a litigant in person. Allowance must be made in that regard.

31. Further, although it is not determinative, whilst the Judgment does contain a reference previously indicated it is equally the case that when the respondent applied to strike the claimant's case out, the Tribunal declined to make an Order and did not order any deposit to be paid.

32. As the evidence emerged, the claimant's view of the first respondent's motivation in the way they behaved towards her, was their desire to protect their contract with the second respondent. The first respondent says that this therefore cannot fit with her holding a belief that any treatment suffered by her was a result of her race or whistle blowing. Further, that the line of enquiry was not pursued during cross examination of the first respondent's witnesses.

33. The second respondent relies on much the same grounds as the first respondent when making its application for costs.

34. In addition, however, the claims against the second respondent were submitted out of time and were dismissed (save and except for one allegation) for that reason.

35. The claimant's responses to the applications for costs have been, in many respects, an attempt to reopen the matters already determined by the Full Merits Hearing. The claimant clearly and firmly believes that the respondent's case succeeded because lies which they told about the claimant were believed by the Tribunal.

36. I have been at pains throughout the hearing to advise the claimant that the Tribunal cannot go behind the findings made at the Full Merits Hearing and as recorded in the Judgment. Her avenues to challenge those findings are by way of reconsideration or appeal. In relation to the fact that the claims against the second respondent were submitted out of time, the claimant firmly believed that the claims were submitted in time and continued to hold that belief before us during the Costs Hearing.

37. So far as the out of time points are concerned, the claimant had had some difficulty submitting her claim form on-line, but this was dealt with in the original Judgment.

38. It is right to say that the original Judgment does not deal with any consideration of extensions of time whether on the basis that the Tribunal was satisfied that it was not reasonably practicable to present claims in time and that they were presented within a reasonable period thereafter or, as applicable, on the just and equitable ground.

39. In her submissions and discussions with the Tribunal during the course of this hearing it became clear to all members of the Tribunal that the claimant simply did not understand the out of time point. Indeed, she seemed to us to be unaware that that was fatal to her claims against the second respondent.

40. The claimant believes that she was let down by her representative at the Hearing, and that the failure to present her case in its best possible light including the failure to put her positive case to the respondent's witnesses appears, from her submissions to us, to be a factor in that representative ceasing to act in the proceedings.

41. It is abundantly clear to me, reinforced by the comments of the Members, that the most difficult aspect of this case was a clarification of the precise allegations which were made by the claimant against the respondents. This, we conclude, was in part due to the claimant's (understandable given her acting as a litigant in person) difficulty in understanding the precise legal claims which might arise from the factual matrix upon which she was relying. In part we conclude that it was also due to the claimant's lack of understanding of the facts which she would have to prove before the Employment Tribunal to substantiate those claims.

Conclusions

42. In paragraph 45 of the Judgment on the Full Merits Hearing, the Tribunal concluded that the claimant's complaints had no reasonable prospects of success.

43. The Members who were present throughout the conduct of the hearing are satisfied that that conclusion was one reached on the basis of all the evidence as it emerged during the course of the hearing.

44. Even if we were satisfied that the claims had, at all times, no reasonable prospect of success we would be obliged to consider whether in the circumstances of the case we should exercise our discretion to make an award of costs in favour of the respondents.

45. The claims against the second respondent were presented out of time but there was, on the face of the Judgment, no consideration of any extensions of time and the claimant's difficulty in presenting her claim on-line (albeit this only covered a short period), was a further mitigating factor.

46. The claims against the second respondent failed on the basis of their presentation out of time, and, bar one claim, on that matter alone.

47. Presentation of the claim during the course of the hearing was clearly fraught with difficulty. There was friction between the claimant and her representative and there is criticism that the claimant's positive case was not put to the respondent's witnesses. The claimant's representative did not act for her throughout the entirety of the hearing.

48. Taking all matters in the round, we are satisfied that:

 48.1 The original Tribunal Judgment confirmed the unanimous view that the claims had no reasonable prospect of success. Thus, the requirement of the first part of Rule 76(1)(b) has been met.

 48.2 We do not conclude that the claimant or her representative acted vexatiously, abusively, disruptively or otherwise unreasonably either in bringing the proceedings or the way that the proceedings had been conducted.

 48.3 We reach that conclusion because we are satisfied that the claimant has held genuine beliefs in the merits of her case. She does not hold those views unreasonably, they are her clear perception of events as they occurred. The fact that she has not brought sufficient evidence before the Tribunal to justify those claims does not mean that she has acted unreasonably in bringing them. She has conducted the matter, in the main, as a litigant in person. She should not, and is not, held to the same standards as a qualified legal representative. As we have said, we consider that she has had considerable difficulty, understandable in a case of this nature, in understanding the factual matrix behind her complaints, the necessary legal tests in relation thereto and the facts which she would have to establish to prove her case. She has focused, understandably, on events as she saw them but we cannot say that to do so was unreasonable or vexatious.

 48.4 There is no suggestion that her conduct was vexatious, abusive or disruptive.

 48.5 For those reasons we do not consider that the claimant has acted in such a way as to invoke Rule 76(1)(a).

 48.6 We must, in the light of all of the above, consider the exercise of our discretion as to whether or not a Costs Order should be made. We are conscious that such an order remains the exception, rather than the Rule (<u>Yerrakalva v Barnsley Metropolitan Borough Council</u> [2012] ICR 420) and that the rules contain a high hurdle to be surmounted before such an Order can be considered (<u>Salinas v Bear Stearns International Holdings Inc</u> [2005] ICR 1117).

 48.7 We take into account the costs warnings made by the respondents but we also reflect upon the fact that the Tribunal was unwilling to

make an Order striking out the claimant's claims or making a Deposit Order as a condition of pursuing any of the complaints which the claimant brought.

48.8 The claimant's ability to pay any Costs Order is a factor which we may consider. On the face of the information provided to us the claimant has sufficient assets to meet a Costs Order in the form of the unencumbered equity in her home.

48.9 We do, however, reflect further on the claimant's position. She was throughout much of the case a litigant in person and in respect of the period when she was represented she was not satisfied with the representation which she received, as a result of which that representation ceased part way through the hearing. The claimant, we are satisfied, did her very best to pursue the claim in a proper way and the fundamental reason why her claims failed was because of a failure to produce sufficient evidence, either in chief or by cross examination of the respondent's witnesses, to satisfy the Tribunal that her complaints were well founded.

48.10 This is not to contradict the suggestion that the claims had no reasonable prospect of success. They had no prospect of success because of that failure. They were not hopeless as ab initio.

49. In all the circumstances of this case, we do not consider it appropriate to exercise our discretion to make a Costs Order against the claimant. As the evidence emerged, the claims had no reasonable prospect of success but that was down to the claimant's inability to establish sufficient facts in support of her claims and complaints. The claimant was, for the bulk of the conduct of the case, acting as a litigant in person, we do not impose the standards upon her that we would impose a party whom had had the benefit of representation throughout the case including as to the preparation of the case

50. For those reasons, we make no Order on the respondent's applications for costs.

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Employment Judge Ord

Date: 2 May 2019

Sent to the parties on: 08.05.19..........

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For the Tribunal Office