



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Ms G Muriithi

v

Kingswood Trust

Heard at: Watford, in chambers only

On: 23 April 2019

Before: Employment Judge L Skehan

Members: A E Brown

B Osborne

RESPONDENT'S COSTS APPLICATION

The respondent's application for costs against the claimant and/or Mr J Carbon, considered by the Employment Tribunal in chambers on 23 April 2019, is unsuccessful and dismissed.

REASONS

1. This application was first submitted by the respondent by email dated 24 August 2018. Written representations were sought from the parties and it was decided that it was in accordance with the overriding objective for this application to be dealt with on paper without the attendance of the parties. All parties were invited to and did make written submissions and these submissions were considered by the employment tribunal.
2. We acknowledge the delay in dealing with the respondent's application. The delay is regrettable and contributed to by the required process to allow the parties to make written representations, the availability of the original tribunal to consider the application and some unavoidable administration delays.
3. The jurisdiction of the Employment Tribunal to make a costs order is contained within the Employment Tribunal (Constitution etc) Regulations 2013, schedule 1 (the Employment Tribunal Rules).

3.1 Rule 76 of the Employment Tribunal Rules:

"A tribunal may make a costs order and shall consider whether to do so, wherever it considers:

- a) A party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonable 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.....

3.2 Rule 80 of the Employment Tribunal Rules:

“A tribunal may make a wasted cost order against a representative in favour of any party (the receiving party) where that party has incurred costs:

- a) As a result of any improper, unreasonable or negligent act or admission on the part of the representative; or
- b) Which, in light of any such act or admission occurring after they were incurred, the tribunal considers it unreasonable to expect the receiving party to pay”

- 4. Essentially the jurisdiction of the employment tribunal provides for a two stage test. Firstly, the employment tribunal considers whether the circumstances are present that allows it to consider making a costs order. Thereafter, the employment tribunal considers whether it should exercise its discretion to make a costs order
- 5. We first examine the application made under the above rules against Mr Carbon. We note that Mr Carbon acted intermittently for the claimant, withdrawing from the tribunal record as the claimant's representative on 26 September 2017, coming back on the tribunal record on 23 January 2018 and withdrawing again as the claimant's representative on 5 March 2018.
- 6. The respondent complains that Mr Carbon:
 - a) should have been aware, not least from the respondent's applications to strike out the claimant's claim, that the claimant's claim had little if any reasonable prospect of success and/or was out of time.
 - b) maintained his views as to the prospects of success and unrealistic quantum of the claimant claims making offers of settlement in the sum of £40,889.49 and later £15,000.
 - c) acted unreasonably in not withdrawing the claimant's claim following the respondent offer on 30 August 2017 not to pursue costs as a later date.
 - d) On 23 January 2018 made a 'baseless and entirely vexatious application to strike out the respondent's defence'
 - e) throughout the course of the proceedings, along with the claimant made unmerited applications to the tribunal.

7. We address the claimant's prospects of success. The main substance of the claimant's claim was a claim for constructive unfair dismissal and many of the events leading to the claimant's dismissal were alleged to be detriments following a protected disclosure in the alternative. We consider that this claim was weak. It was subsequently unsuccessful at final hearing. However, the case turned entirely on its own facts. The employment tribunal, on the balance of probabilities, preferred the evidence of the respondent to that of the claimant. Prior to the final hearing, the tribunal declined to grant the respondent's applications for a strike out and/or deposit order relating to the claimant's claims. It was unable to do so without a complete examination of the evidence. While the case was weak, we do not consider that this main element of the claimant's case can be reasonably said to have had little or no reasonable prospect of success.
8. We note the aspects of the claimant's claim relating to holiday pay and unauthorised deductions from wages and refer to our findings as set out in the judgement. We conclude that these particular claims were weak to the extent that they may be reasonably considered to have had little or no reasonable prospect of success.
9. It is noted that Mr Carbon made offers of settlement of the claimant's claim in the sum of £40,889.49 and later £15,000. It is not possible for the tribunal to make any finding in relation to Mr Carbon's view of the prospects of success in respect of his client's claim from these negotiations. The Employment Tribunal is not privy to the instructions received by Mr Carbon, nor does it have any information in relation to the advice provided by Mr Carbon to his client. It is noted that the only offer made by the respondent was that should the claimant withdraw all of her claims by 4 August 2017, the respondent would not pursue costs at a later date. We do not know what Mr Carbon's advice was at this stage. However, as we have found that the claimant's main claim while weak, did not have little or no reasonable prospect of success, we do not consider that the employment tribunal has jurisdiction to consider a costs award on this basis.
10. We potentially have we have jurisdiction to consider whether or not to make a costs award under the rules in respect of the unauthorised deduction from wages and holiday pay claims. However, these matters were pursued by Mr Carbon and the claimant alongside the claim for constructive unfair dismissal and detriment following a protected disclosure. These additional claims were not properly particularised by the claimant, and unsurprisingly unsuccessful at hearing. When viewing the matter in its entirety, if we were minded to make a costs award, the costs that could be fairly attributable to the claims would be minimal. A decision by the claimant to withdraw these claims, and proceed only with the main claim, would not necessarily reduce the costs incurred by the respondent. The situation would obviously be different if the claimant had pursued these claims alone. Taking the entirety of the circumstances into account, we decline to exercise discretion to make a costs order arising from the unauthorised deduction from wages claim and/or holiday pay claim.

11. Mr Carbon ceased acting for the claimant on 5 March and claimant was unrepresented prior to the final hearing. Following this time, the claimant writes to the Employment Tribunal, complaining that Mr Carbon has narrowed her claim without her consent. The available information points to the claimant's desire to proceed with her claim to final hearing irrespective of any advice she may or may not have had from Mr Carbon. We do not have sufficient evidence to conclude that any particular action on Mr Carbon's part (other than the application to have the respondent's defence struck out which is dealt with separately) meets the required standard within the employment tribunal rules for the employment tribunal to have jurisdiction to consider an award of costs against Mr Carbon.
12. Mr Carbon lodged an application with the Employment Tribunal on 23 January 2018 requesting amongst other matters that the Employment Tribunal strike out the respondent's response. This application was refused by Judge Vowles on 24 February 2018 for the reason given in the respondent's response to the application. The reason given by the respondents was that the application, 'is unmerited and vexatious'. In considering this particular action, the Employment Tribunal considers that it potentially has jurisdiction to make either a costs order or a wasted cost order against Mr Carbon. This application from Mr Carbon follows an unsuccessful application on the part of the respondent to have the claimant's claim struck out. It is obvious to this tribunal, having heard the entirety of the evidence, and taking into account the nature of the claim, that the Employment Tribunal was unable to determine any such application without hearing the evidence. We also note that the matter was dealt with by the respondent appropriately by way of e-mail representation and disposed of swiftly by the Employment Tribunal on paper without the need for a separate hearing. Taking all the circumstances into account, the Employment Tribunal declines to exercise its discretion to make a costs order against Mr Carbon arising from his actions in making the application to strike out the respondent's response, under the above jurisdiction.
13. We examine the application made under the above rules against the claimant personally. The complaints made against Mr Carbon as set out above are repeated against the claimant and the respondent additionally alleges that The claimant acted unreasonably in failing to withdraw her claim on 19 May 2018 when the respondent reiterated its position that her claims had no or little reasonable prospect of success and the claimant was warned of the potential cost consequences in proceeding with her claim. In considering the entirety of the representations made by the parties and the circumstances of the claim, for the same reasons as set out above, we decline to make a costs award against the claimant.
14. The respondent's application is unsuccessful and dismissed.

Employment Judge Skehan

Date:10 May 2019.....

Sent to the parties on: ..22 May 2019..

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For the Tribunal Office