



EMPLOYMENT TRIBUNALS

Claimant:
Miss S Amir

v

Respondent:
Royal Berkshire NHS
Foundation Trust

JUDGMENT ON AN APPLICATION FOR COSTS BY THE RESPONDENT

The Respondent's application for costs is refused.

REASONS

1. By a claim form presented on 18 February 2017, the Claimant presented a claim form that she was discriminated against on the grounds of disability and religion or belief. The Claimant also complained that she was owed arrears of pay and other payments. In a response received at the Tribunal on 27 March 2017, the Respondent denied all the Claimant's complaints.
2. The Claimant's claim was listed for a preliminary hearing to take place on 31 May 2017. On 30 May 2017, the case was postponed by Regional Employment Judge Byrne because there was no judge to hear the case on 31 May 2017. The case was relisted for a hearing to take place on 27 July 2017 when the case was again postponed because there was no judge to hear the case. The case was listed for hearing on 19 December 2017. The preliminary hearing took place on 19 December 2017 before Employment Judge S Jenkins. The Claimant appeared in person and the Respondent was represented by solicitor, Mr Pender.
3. Following a hearing which lasted for two hours 18 minutes according to the Employment Tribunal Record of Proceedings form, the Employment Judge set out a case management summary which included identification of the issues in the case setting out a number of different complaints being pursued by the Claimant. The Employment Judge also made a number of directions in respect of the disclosure of documents for provision of a statement of remedy or schedule of loss, provisions relating to medical and expert evidence, the preparation of a trial bundle of documents, the exchange of witness statements and the provision of a chronology and cast list. The full merits hearing was listed to take place over five days

commencing on 29 October 2018. This gave the parties a period of about 10 months and 10 days to prepare for the hearing.

4. The case came up for hearing before Employment Judge Gumbiti-Zimuto sitting with Members Ms C Carr and Mr N Singh. On that occasion, an order was made that the hearing was adjourned and that the case may be relisted before any other Tribunal. The Respondent made an application to strike out the Claimant's complaints and it was decided that the application to strike out the complaints would be considered on 2 November at 12 noon. The Claimant was ordered to send to the Tribunal to arrive no later than 4.00 pm on 1 November any evidence including any witness statements or medical evidence on which she wished to rely in support of her application or in order to resist the Respondent's application. The Claimant was applying for the Judgment striking out her complaints about disability discrimination to be set aside and the Respondent was applying to strike out the claims on the grounds that the Claimant had failed to comply with the Tribunal's orders.
5. On 2 November 2018, the Claimant did not attend before the Tribunal. The decision of the Tribunal was to stay the claim until 2 February or until further order.
6. On this occasion the Respondent's application for the Claimant to pay the Respondent's costs incurred at the hearing on 29 October and 2 November were put over to be heard by an Employment Judge sitting alone on 25 March 2019.
7. Paragraph 3 of the Order made stated that the Claimant not attending, not being represented and the Claimant having failed to serve on the Respondent any documents including any witness statements or medical evidence in support of her application for a reconsideration of the Judgment striking out her complaints about disability discrimination by no later than 4.00 pm the application was dismissed. The remaining live applications were therefore whether the Claimant's claims should be struck out on the grounds that the Claimant had failed to comply with the Tribunal's orders and the Respondent's application for costs relating to the hearing on 29 October and 2 November.
8. The Claimant's case came up for hearing before Employment Judge Vowles on 25 March 2019 and following hearings before him the Claimant's application for a reconsideration of a decision to dismiss her application was refused and the Respondent's application for the Claimant's claim to be struck out was granted.
9. In respect of the Respondent's application for costs, the Tribunal made the following order. Firstly, that the Respondent was to make the application in writing within 14 days and send a copy to the Claimant and to the Respondent and the Claimant within 14 days of receipt of the application was to send to the Tribunal and copy to the Respondent her response to

the application with reasons why a costs order should not be made against her and details of her ability to pay such an order.

10. The grounds for the Respondent's application for costs were set out in a letter provided to the Tribunal on 8 April 2019. In that application, the Respondent pointed out that a number of orders were made by Employment Judge Jenkins on 19 December 2017 and that the Claimant had failed to comply with those orders. It was pointed out that the orders included the requirement that the Claimant provide a statement for mutual exchange, provide medical records, disclose documents, provide a schedule of loss and attend a hearing listed to take place on 29 October. The Respondent points out that in respect of all of those matters, the Claimant failed to comply with any of the orders.
11. The Respondent points out that despite failing to fulfil any of the orders indicated the Claimant attended the hearing which was listed to take place on 29 October knowing that the Respondent had prepared statements which were waiting to be exchanged and without bringing her copy of the hearing bundle which had been sent to her in the post prior to the hearing. The Claimant also attended the hearing with a baby that required attention throughout the short time that the hearing took place and she was unprepared for the hearing. The Respondent points out that the Claimant was aware at least 10 months earlier of the date of the hearing and that she could have undertaken reasonable steps in order to provide suitable childcare for her baby in order to be able to attend the hearing and because she came with the baby which required constant attention the hearing on that date was effectively abortive. The Respondent points out that the Claimant stated at the hearing on 25 March that she had been suffering from post-natal depression following the birth of her child. The Respondent makes an application for costs in relation to the hearings on 29 October and 2 November on the grounds that there has been a breach that the criteria set out in rule 76(1)(a) and rule 76(2) have been met and the Tribunal has the power to make an order for costs. The total amount of costs claimed is £4,533.75 which equates to 23 hours and 15 minutes' preparation for and attendance at the hearings on 29 October and 2 November 2018.
12. On 23 April 2019, the Claimant sent an email to the Tribunal which insofar as is relevant reads as follows:

"I refer to the above case regarding the application for costs made by the Respondent on 8 April 2019. I oppose this application due to the following reasons. I am unemployed caring full time for my 11 month old baby. I live in a social housing and receive state benefit. I have suffered depression and anxiety for the past three years. I was diagnosed with pre- and post-natal depression and anxiety after the birth of my baby. I am taking an antidepressant and getting counselling."
13. The order which was made by Employment Judge Vowles indicated that the costs application would be considered on the papers unless either

party requested a hearing. Neither the Claimant nor the Respondent has sought a hearing. Rule 76(1) of the Employment Tribunals Rules of Procedure 2013 provides that:

“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 that the proceedings (or part) have been conducted; or
- (b) Any claim or response had no reasonable prospect of success.”

14. Rule 76(2) provides for circumstances where:

“A tribunal may make an order for costs where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party.”

15. I am satisfied in this case that the conduct of the proceedings by the Claimant has been unreasonable and further, that the Claimant has failed to comply with the Tribunal’s orders. The Claimant has failed to provide and cogent explanation for her failure to comply. I appreciate that the Claimant has stated that she has suffered from depression and post-natal depression but beyond that the Claimant has not explained how this has impacted on her ability to prepare for this case and/or fail to comply with the relevant orders which have been made by the Tribunal. The Claimant has not really cooperated with the Respondent by, for example, communicating with them the difficulties that she is facing, or explaining why she is not able to do the various steps which were required at various points during the course of this case.

16. I am satisfied that this is a case where the Tribunal’s power to make an order for costs either pursuant to rule 76(1) or 76(2) has been triggered.

17. The power to make a costs order under those rules is discretionary. The Claimant has provided a statement, brief though it is, setting out her circumstances. She is unemployed; she has an 11 month old baby; she lives in social housing and is in receipt of state benefits; she suffers from depression and anxiety and has done so for the past three years; she was diagnosed with pre- and post-natal depression and she is taking anti-depressants and counselling.

18. Whilst I appreciate that the Claimant’s means and outgoings have not been set out in any more detail, it seems to me that it is unlikely that the Claimant would be in a position to meet any order for costs that are made against her other than a very nominal amount.

19. I note that the entirety of the Claimant’s claims have now come to an end and that the reason that they have come to an end has essentially been because of the Claimant’s inability to prepare for the cases. I again note

that the Claimant puts this down to her circumstances arising from anxiety, depression and having a new baby.

Should I make an order for costs in this case?

20. In deciding whether or not to make an order for costs, rule 84 deals with the ability to pay and provides that in deciding whether to make a costs order and if so in what amount the Tribunal may have regard to the paying party's ability to pay. I am satisfied that the Claimant really has no ability to pay an award for costs other than as I have already indicated a very nominal amount and it seems to me, taking that factor into account and also the fact that the Claimant's claims have not been determined after a hearing on the merits where the substance of the claim is considered against the substance of the Respondent's response, that the appropriate way to deal with this case is to make no order for costs.
21. I come to that conclusion because the claims have come to an end and the level of costs that have been incurred by the Respondent would have been no doubt much greater had the cases proceeded to a hearing. The Claimant has not had the opportunity of having the substance of her claims heard.
22. I also have reflected on the fact that the Respondent is a large public body and whilst its resources ought not to be squandered fighting unmeritorious cases, I also have to reflect on the fact that the Claimant is not in a position to pay any costs other than a nominal amount

Employment Judge Gumbiti-Zimuto

Date: 3 July 2019

Judgment and Reasons

Sent to the parties on: ...11/07/19.....

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For the Tribunal Office