THE EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr K Kansal	**v**	**Tullett Prebon Group Limited and others**

Heard at: London Central **On**: 30 May 2019

Before: Employment Judge Glennie

Representation:
Claimant: In person
Respondent: Ms J Russell (Counsel)

JUDGMENT ON COSTS APPLICATION

The judgment of the Tribunal is that the Claimant's application for a costs order is refused.

REASONS

1. These reasons relate to the Claimant's costs application following the Tribunal's judgment on liability, its further judgment on remission from the Employment Appeal Tribunal, and its judgment on remedy.

2. The lay members who sat on the liability and remedy hearings have both retired and moved away from the London area. The parties consented to the costs application being determined by the Employment Judge sitting alone.

3. The Claimant's application is based on the contentions that elements of the Respondents' case had no reasonable prospect of success, and that the Respondent acted unreasonably in the way that the proceedings, or part, were conducted. This reflected Rule 76 of the Rules of procedure, which provides (in part) as follows:

   (1) A Tribunal may make a costs order……and shall consider whether to do so, where it considers that –

(a) A party (or that party's representative) has acted……unreasonably in either the bringing of the proceedings (or part) or that the way the proceedings (or part) have been conducted; or

(b) Any claim or response had no reasonable prospect of success.

4. Rule 78 provides that, if a costs order is made, the Tribunal may order payment of the whole or a specified part of the receiving party's costs, with the amount to be paid being determined by way of detailed assessment carried out by a County Court or an Employment Judge. The Claimant estimated his costs at around £154,000. The parties accepted that, if I were to make a costs order, it could be for a proportion of the total claim.

5. Costs orders are the exception, not the rule, in the Employment Tribunal. This point was affirmed by the Court of Appeal in **Yerrakalva v Barnsley MBC [2012] ICR**, where Mummery LJ also made the following observations, which are expressed in terms of the conduct of a claimant, but which are equally applicable to respondents:

"41. The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to 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."

6. Mummery LJ continued that it was not necessary for there to be a precise causal link between the unreasonable conduct and the specific costs being claimed, but that equally it was erroneous to think that causation was irrelevant or that the circumstances had to be separated into sections and each section analysed separately, so as to lose sight of the totality of the relevant circumstances.

7. In **Health Development Agency v Parish EAT/0543/03** the Employment Appeal Tribunal confirmed that conduct prior to the claim being brought cannot found a costs order. A Tribunal cannot therefore properly make a costs order because it found the conduct that gave rise to the complaints (for example, acts of discrimination) to be unreasonable. In the case of a respondent, the focus is on the defending of the claim and conduct of the case.

8. On the issue as to prospects of success, it is important to note that the provision is that the response "had" no reasonable prospect of success. The Tribunal should avoid the trap of concluding that a defence had no reasonable prospect of success purely because, having heard all the evidence, the Tribunal found against the Respondent.

9. If the Tribunal decides that either or both of the threshold requirements for the making of a costs order has been established, it does not automatically follow that a costs order should be made. Rule 76 provides that a Tribunal

"may" then make a costs order: there is a discretion (to be exercised judicially) whether to do so or not.

10. Rule 84 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". The Claimant drew attention to this rule and to the decision of the Employment Appeal Tribunal in **Doyle v North West London Hospitals NHS Trust UKEAT/0271/11**. That case emphasises that a Tribunal should exercise caution before making a costs order that the party concerned is unlikely to be able to pay. I do not read this rule, or the EAT's decision in **Doyle** as meaning that a Tribunal may take the fact that a party clearly does have the means to pay a costs order as a positive reason for making such an order where it would not otherwise have done so – if that is a fair reading of paragraph 9 of the Claimant's written submissions. I am satisfied that inability to pay may be a reason for not making an order when this would otherwise have been done: but ability to pay is not a legitimate reason for making an order when this would not otherwise have been done.

11. The Claimant focussed on four elements of his claim, where he was successful on liability, and submitted that in respect of each of them there had been no reasonable prospect of the Respondents' defence succeeding, and/or that the conduct of that defence was unreasonable.

12. The first element consisted of the seven allegations of harassment related to race on which the Claimant succeeded. All of these involved acts committed by the Third Respondent, Mr Campbell. There were, however, also six allegations of harassment that did not succeed, for various reasons. Furthermore, I accept Ms Russell's point that the Tribunal decided the factual disputes about these allegations as a matter of probability: in preferring the Claimant's evidence to Mr Campbell's on the successful aspects, the Tribunal did not make a finding that Mr Campbell was lying. In short, the Tribunal had to make findings of fact about these allegations, and did so. This does not mean that the unsuccessful party had no prospect of success or that it was acting unreasonably in putting forward its defence.

13. I find that the threshold requirements under Rule 76 are not made out in respect of the harassment findings.

14. The second element relied on by the Claimant was the finding (on remission from the EAT) that the Respondents directly discriminated against the Claimant with regard to working from home. The Claimant suggested that the Tribunal had rejected Mr Campbell's evidence on this aspect as "absurd, unreliable and evasive" (paragraph 22 of his written submissions). This is an overstatement of the position. The Tribunal in fact found Mr Campbell's evidence about the checks he made into the Claimant's absences to be "unsatisfactory" (paragraph 165 of the liability reasons) and "unreliable" (paragraph 9.5 of the reasons on remission).

This led to a finding that the Respondents had failed to discharge the burden of proof with regard to this complaint.

15. I find that this does not mean that there was no prospect of the Respondents' defence succeeding, or that the Respondents acted unreasonably. It is a case where the Claimant won the point and the Respondents lost: but in my judgment it is no more than that. I find that in this regard, the threshold requirements under Rule 76 have not been made out.

16. The Claimant's third area of argument concerned the successful victimisation complaint regarding being berated by Mr Dunkley. There was no dispute of fact about what Mr Dunkley said on this occasion, as the meeting was recorded. It was a matter of judgment whether or not what occurred amounted to a detriment to the Claimant. The Tribunal concluded that it did, but that does not mean that there was no reasonable prospect of successfully arguing that it did not, or that it was unreasonable to maintain that defence. I find that it would be unrealistic to say, in relation to an allegation of this nature, that it was effectively a foregone conclusion that a Tribunal would find that this amounted to a detriment. Again, I find that the threshold requirements under Rule 76 have not been made out.

17. In relation to these three elements of the costs application, if I am wrong in my conclusions about the threshold requirements, I would exercise the discretion against making a costs order. I would do so by reason of the factors that have led me to conclude that the threshold requirements have not been made out, and because the Claimant was unsuccessful in many elements of his claim. (I have not attempted to evaluate the relative proportions of success or failure: it is sufficient to say that many complaints were successful, and many were not).

18. The fourth element relied on by the Claimant was the successful victimisation complaint about SSP (or rather, the non-payment of company sick pay). The Tribunal's conclusions about this issue are in paragraphs 214 and 215 of the liability reasons. I have concluded that there was no reasonable prospect of the Respondents' defence of this issue succeeding. It was company policy that sick pay (beyond SSP) would not be paid if the employee concerned had raised a grievance. If that grievance amounted to a protected act, then it seems to me to be inescapable that a complaint of victimisation would succeed. It could be said that, reduced to the essential elements, the defence amounted to an assertion that it was company policy to victimise employees in those circumstances.

19. I have therefore found that the threshold requirement under Rule 76 has been reached. The question therefore arises as to whether I should exercise the discretion in favour of making a costs order.

20. One factor in favour of doing so is the fact that I have found that the Respondents' defence had no reasonable prospect of success. Another is

that the Claimant has been put to some expense in fighting this element of his claim. Against these, however, are the following factors:

20.1 This was a small element of a very wide-ranging claim. It took very little of the hearing time, the submissions, or the Tribunal's reasons.

20.2 The Claimant was unsuccessful in many elements of his claim.

20.3 There has, in the event, been a double recovery of the balance of sick pay that would have been payable under the company scheme (£6,659.60).

20.4 It is likely that the latter amount would exceed any costs referable to the sick pay point.

21. On balance, I have concluded that I should not make a costs order in respect of the compliant about sick pay.

22. Finally, the Claimant has submitted that the Respondents have never made any reasonable offer of settlement. In paragraph 32 of his written submissions, the Claimant set out the various offers made by the Respondents. The highest of these was £130,000. In paragraph 23(5) of her written submissions, Ms Russell added the offers made by the Claimant. The lowest of these was £750,000 net (said be in excess of £1m when grossed up). The Tribunal awarded £487,777.

23. In the event, neither party's offers were close to the Tribunal's ultimate award. This is not a criticism of either party: it is by no means easy to predict how a Tribunal will decide a case, whether as to liability or as to quantum. I find that I cannot say that the Respondent has acted unreasonably in failing to make a higher offer that was closer to the ultimate result, any more than the Claimant acted unreasonably in failing to make a lower offer that was closer to the ultimate result. In any event, and for essentially the same reason, I would not exercise the discretion in favour of making a costs order.

24. The application for a costs order therefore fails.

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Employment Judge Glennie

Dated: 29 July 2019

Judgment sent to the parties on:

30 July 2019

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For the Tribunal Office