



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant
Miss NV Heywood

Respondent
Marks and Spencer Plc

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Manchester on 29 July 2019 in Chambers

EMPLOYMENT JUDGE Warren
Members: Mr AJ Gill
Mrs CS Jammeh

Representation

Neither party attended - by agreement this application was dealt with on the papers

JUDGMENT

The unanimous judgement of the Tribunal is that the respondent's application for costs fails and no order for costs is made

REASONS

Background and Issues

1. The claimant brought claims of direct and indirect discrimination based on her disability. The case was heard in June and August 2018 and dismissed as ill founded.
2. Written reasons were promulgated on 27 October 2019.
3. The respondent applied for costs against the claimant on the basis

that the claimant acted unreasonably in bringing her claim (Rule 76 (1)(a) and or that the claim had no reasonable prospect of success (Rule 76 (1)(b))

The Evidence

4. The claimant provided 2 witness statements. In the first she argued that she would suffer financial hardship, despite working part time and living with her husband who is an Events projects manager.
5. However in a supplementary statement she explained that she was separated from her husband and was managing on her earnings from part time work, a personal independence payment and was expecting to receive universal credit.
6. She has debts being repaid each month along with the usual outgoings and has nothing left, and no savings.

Representations of the claimant

7. The claimant argues that regardless of the merits of the respondent's application, if her means are taken into account then she is unable to pay anything.
8. Her solicitors remind us of the case of *Gee v Shell UK Ltd 2003 IRLR 82* in which the Court of Appeal made it clear that costs orders in the Employment Tribunal are the exception rather than the rule. The grounds sought by the respondent are discretionary grounds, and even if made out the Tribunal does not have to make a costs order.
9. The test is two fold: Does one or more of the grounds in Rule 76 (1) apply to require the Tribunal to consider making an order and if so is it appropriate for the Tribunal to exercise its discretion in favour of making a costs order. One of the factors which may be considered is the party's ability to pay, and or the issuing of a costs warning letter.
10. The issue of unreasonableness is a matter of fact which should be given its ordinary meaning - *Dyer v Secretary for State for Employment EAT 183/83*
11. *Kapoor v Governing Body of Barnhill Community High School EAT 0352/13*, even if a party knowingly gave false evidence costs should not automatically be awarded.
12. The crux of the claimant's case was that she had been rejected for

employment, and the Tribunal found that her belief was reasonable which gave her reasonable grounds for bringing her claim, even when issued with the costs warning from the respondent.

Representations of the respondent

13. The respondent wrote to the claimant giving a costs warning on 8 June 2018 and knew from then that her case lacked a reasonable chance of success. The proposal was rejected by the claimant's solicitor.
14. The claimant's evidence conflicted with that of her husband and the Tribunal found there to be misinterpretation at best and more likely exaggeration.
15. The respondent asserts that the claimant fabricated evidence which is unreasonable conduct.

Conclusions

16. Did the claimant behave unreasonably? We find not. We found that she, and all other candidates were not well treated over the administration of her application, leaving her reasonably believing that she had been rejected for the job.
17. We preferred the evidence of the respondent witnesses, but we do not consider her claim to have been manufactured. We could see how she reached the conclusions about the way she had been treated from the unfortunate manner of communication by the respondent, which we were advised had changed now.
18. We noted that the respondent had not at the outset applied for the claim to be struck out, nor applied for a deposit to be paid, on the basis that the claim stood little prospect of success.
19. It was only when the claimant's husband gave evidence that it became apparent that their accounts were not consistent with each other and we therefore found ourselves preferring the evidence of the respondent witnesses.
20. In the circumstances we do not find that the claimant acted unreasonably in bringing her claim, and could not have known that her case had no reasonable prospect of success. We do not therefore need to move to the second part of the test.

21. If we had found to the contrary and considered it appropriate to consider making a costs order in the light of her supplemental witness statement to the Tribunal dated 1 March 2019 we would have taken the claimant's means into account.
22. Her circumstances have changed, she is now single mother of 2 children, working part time and living in rented accommodation. She has no savings, and when considering the detail of her statement she no longer has the means to pay a costs order.

Employment Judge Warren

Signed on 6 October 2019

Judgment sent to Parties on

31 October 2019