



EMPLOYMENT TRIBUNALS

Claimant: Mrs B Fitzgerald

Respondent: Casual Dining Group Limited

Heard at: London Central

On: 28 October 2019

Before: Employment Judge K Welch
Mrs L Moreton
Ms T Breslin

Representation

Claimant: Mr M Fitzgerald, husband

Respondent: Mr M Foster, Solicitor

RESERVED COSTS JUDGMENT

The unanimous judgment of the Tribunal is that the Claimant is ordered to pay the Respondent's costs in the sum of £10,000.

RESERVED REASONS

Background

1. The Claimant brought complaints of unfair constructive dismissal, direct and indirect race discrimination, direct and indirect marital discrimination, victimisation and breach of contract. The claims were dismissed in their entirety and an oral judgment was given on 23 March 2018.
2. Written reasons were requested, although for various reasons the request was not received by the Judge until some months later. Therefore written reasons were sent to the parties dated 8 May 2019.

3. The Respondent made two separate applications for costs relating to this matter which were both dealt with in a cost hearing on 28 October 2019 before a full panel, being the same panel who heard the original hearing.
4. The Claimant did not attend the costs hearing but was represented by her husband. Therefore no oral evidence was given to the Tribunal.
5. The two applications for costs were dated 16 January 2018 and 4 April 2018. The Respondent made clear in its application, and at the hearing, that it was not claiming costs in relation to a failure to consult under the TUPE regulations nor costs relating to subject access requests made by the Claimant.
6. The Respondent provided two separate schedules of costs for work done, although it was acknowledged that the schedule of works done from 14 November 2017 to 23 March 2018 included costs relating to both applications for costs, and therefore it was agreed that the Tribunal would look at this schedule when considering what costs had been incurred and what was reasonable for the Tribunal to take into consideration.
7. The total of the costs within that schedule amounted to £25,213 although following discussions with the Respondent's representative and the Claimant's husband, it was agreed that the total schedule of costs claimed by the Respondent including both cost applications was £19,265. Mr Fitzgerald made clear that he did not consider that this should be ordered, but accepted that these costs had been incurred in respect of these cost applications. It was therefore appropriate for summary assessment by the tribunal.
8. The hourly rates used in the schedule were either £80 or £110 per hour, which the Tribunal acknowledged were within the allowable rates and were significantly less than the maximum allowed.

9. The Respondent had sent a letter to the Claimant on 6 November 2017 warning the Claimant that if she did not withdraw her claims against the Respondent, the Respondent would have “no hesitation but to apply for [its] legal costs against the Claimant on the grounds that they had little or no reasonable prospect of success”. The Claimant was given until 30 November 2017 to withdraw her claims, but failed to do so resulting in a four-day employment Tribunal hearing.
10. The Respondent’s costs’ applications were that her claims had no reasonable prospect of success and/or in that pursuing them, and continuing to pursue them in light of this, that she had acted unreasonably.
11. Mr Fitzgerald objected to the Claimant’s applications on the basis that the Claimant had acted reasonably at all times, had acted in good faith and had reviewed the merits of her claim to the best of her ability, being a non-legally qualified person. The Claimant was not legally represented, since Mr Fitzgerald was not qualified to practice law in the United Kingdom. Further, the Claimant, subsequent to the costs warning dated 6 November 2017, had filed further particulars relating to her claim and no updated costs warning was given. The Respondent had not made any further applications to strike out the claims on the basis that they had no reasonable prospects of success, and, therefore, the Claimant considered that the threshold had not been met to consider costs, which should be treated as the exception rather than the rule.
12. The Tribunal requested details concerning the Claimant’s ability to pay costs. No oral or documentary evidence was given in this regard. Mr Fitzgerald confirmed that the Claimant was not currently working, having voluntarily resigned from her latest role on 15 October 2019 for personal reasons in order to look after her family. The Claimant is not a joint owner

of the matrimonial home which is owned by Mr Fitzgerald. She has savings of approximately £1,000 in a savings account and no joint savings with her husband. She does not own a vehicle and has no personal possessions of value.

Law

13. The Tribunal considered the application in accordance with Rules 74 to 84 of the Employment Tribunal Rules of Procedure 2013. The power to make costs or awards is contained in Rule 76 of these rules and provides:

*“76.— When a costs order or a preparation time order may or shall be made
(1) 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;

(b) any claim or response had no reasonable prospect of success;...”

14. The Tribunal has to consider two questions as follows:-

- a. whether the Tribunal has power to make an order; and if so
- b. whether the discretion should be exercised.

15. A Tribunal may award costs in a specified sum not exceeding £20,000 by virtue of Rule 78. It is possible to order larger sums in respect of costs, but only in circumstances where detailed assessment of costs has been carried out.

16. When deciding to make a costs order, the Tribunal should approach this in a broad brush manner rather than seeking to calculate precisely what costs are attributable to each allegation of unreasonable conduct. Under the authority of Yerrakalva v Barnsley Metropolitan Borough Council [2012] ICR

420, the Tribunal should sit back and survey the whole picture and make an award which reasonably reflects the conduct in question and its effects.

17. The Tribunal may take into account the means of the paying party in considering the paying party's ability to pay by virtue of Rule 84. The Tribunal considered the judgment from the EAT in Jilly v Birmingham and Solihull Mental Health NHS Trust and Others UK EAT/0584/06 which stated that in many cases it would be desirable to take into account the paying party's means, although sometimes there will be a good reason not to, such as where he or she has not attended or has given unsatisfactory evidence as to means. This case was under the predecessor of Rule 84, although still has relevance to our decision.
18. We considered that orders for costs in the Employment Tribunal are the exception rather than the rule and, were costs awarded too readily, this may deter individuals of low means in particular of pursuing their claims. However, we also considered that the Rules of procedure were revised in 2011 and 2013 such that they implied that Tribunals should consider exercising their powers where unmeritorious cases were pursued or where parties had behaved improperly or unreasonably.

First stage

19. The Tribunal unanimously considered that the Claimant's complaints of constructive unfair dismissal, direct race discrimination, indirect race discrimination, direct marital status discrimination, indirect marital status discrimination, victimisation and breach of contract had no reasonable prospects of success from the beginning for reasons set out in the original judgment. They were bound to fail, and the Claimant ought to have known this from, at least, receipt of the costs warning letter.

20. Whilst we considered that the Claimant was not represented by a person qualified in the United Kingdom, the Claimant was in a position to take legal advice should she have wished to do so, particularly having received the costs warning letter referred to above.

21. We also considered that the Claimant had acted unreasonably in continuing with her claims following the costs warning letter dated 6 November 2017. Therefore, we considered that the first stage had been passed.

Second stage

22. The Tribunal then considered whether it was appropriate to exercise its discretion to award costs in this case.

23. The Tribunal felt that, as the claims had no reasonable prospects of success at the outset, and as she had acted unreasonably in continuing with those claims, we thought it was appropriate to exercise the Tribunal's discretion to award costs in this case.

24. Turning to the level of costs claimed, we were satisfied that the hourly rates were appropriate. We did not consider that the Respondent's failure to attempt to settle the Claimant's claims was relevant to our decision, despite Mr Fitzgerald requesting us to take this into account.

25. We also did not consider that the costs warning letter in referring to the Claimant's claims having "little or no reasonable prospects of success" made any difference to the exercise of our discretion in this case.

26. Whilst we accept that the Claimant complied with deadlines and provided further particulars of her claim following the costs warning letter on 6 November 2017, this was not the basis upon which costs were to be ordered.

27. In looking at the schedule of costs provided by the Respondent, we do not consider that the amounts were excessive or overinflated although took the

view that there must be some element of duplication in the sums claimed.

We also considered that there should be a reduction in respect of the sex discrimination claims (for which costs were not sought) which formed part of the costs schedule.

28. We took into account the information provided by Mr Fitzgerald regarding the Claimant's means in coming to our decision.

29. The Tribunal considered that the Claimant should be ordered to pay costs to the Respondent in the sum of £10,000 on the basis that the Claimant's claims had no reasonable prospects of success from the outset and/or that she had acted unreasonably in continuing with her claims following receipt of the costs warning letter.

Employment Judge Welch

Date 28/10/2019

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
19/11/2019

FOR EMPLOYMENT TRIBUNALS