



THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON SOUTH

BEFORE: EMPLOYMENT JUDGE BALOGUN

MEMBERS: Ms J Forecast
Ms M Foster-Norman

BETWEEN:

Mr J Bottomley

Claimant

And

Go Ahead London

Respondent

ON: 6 November 2019

Hearing in Chambers

COSTS JUDGMENT

The Claimant is ordered to pay the Respondent £1,000 towards its costs.

REASONS

1. This was a hearing to consider the costs application of the Respondent dated 9 September 2019, made at the end of the full merits hearing. The parties agreed that the application could be dealt with on the papers to avoid the need for them to attend.
2. The application was made under rule 76(1)(a) and (b) of the Employment Tribunal's Rules of Procedure 2013 (the "Rules"). Rule 76 provides that if a party against whom an application for costs is made is considered by the tribunal to have either, in bringing the proceedings or in conducting them, acted vexatiously, abusively, disruptively or otherwise unreasonably, or the claim or response had no reasonable prospect of success, then the tribunal must consider making a costs order against that party.

3. As a starting point, it is important to point out that costs do not follow the event in this jurisdiction and are still relatively unusual. Where they are awarded, they are intended to be compensatory, not punitive.

Issues

4. The issues that we have to determine are:
 - a. whether the threshold for a costs order has been met;
 - b. whether a costs order should be made; and
 - c. if so, in what amount

Has the threshold for a costs order been met

5. The Claimant's case, in a nutshell was that the Respondent directly discriminated against him on grounds of age by not shortlisting him for an assessment day for the role of Operations Manager.
6. In our liability judgment, we accepted the Respondent's evidence that the reason for not shortlisting the Claimant was because he did not have relevant London experience for the role. We found that this was a reason that had nothing to do with the Claimant's age and on that basis, his claim was dismissed.
7. The Respondent contends that the Claimant acted unreasonably in continuing his claim of age discrimination after it had provided him with copies of the comparators' CVs and the witness evidence of its 2 witnesses. The Respondent says that at that point, it should have been apparent to the Claimant that his claim had no reasonable prospect of success and he should have withdrawn it.
8. The Claimant's central argument in support of his claim was that he was invited for an interview for the same role in 2015, when he was 3 years younger. Given that there was very limited evidence before us at the liability hearing relating to the 2015 exercise, there was no basis for us to draw any inferences of discrimination from the different outcomes. Conversely, the Respondent provided cogent evidence in support of its position.
9. Although at a preliminary hearing held on 2 May 2019, I had refused the Respondent's application for a deposit order, I had nevertheless urged the Claimant to consider carefully whether he should continue with his claim, once he had received disclosure of the relevant documents from the Respondent. He received those documents on 15 May 2019. Accompanying the documents was a letter from the Respondent's representatives explaining why they believed his case had no reasonable prospects of success. The Claimant was urged to take independent legal advice and was directed to sources of free advice. The Claimant did not respond to the letter.
10. In our view, it should have been obvious to the Claimant once he received the Respondent's disclosure that there were genuine reasons for not inviting him for interview, which had nothing to do with his age. The fact that he persisted with his claim regardless, when there was no reasonable prospect of it succeeding was in our view unreasonable. We therefore consider that the threshold for a costs order has been met.

Should a costs order be made

11. Rule 84 of the Rules provides that in deciding whether to make a costs order, the Tribunal may have regard to the paying party's ability to pay. The Claimant has provided a breakdown of his monthly income and expenditure. Some of the items listed under expenditure are non-essential and once these have been excluded, the net amount available to him is about £265. There is no information provided about capital or savings. Nevertheless, based on the information he has provided, we believe he has sufficient means to meet a costs order and that such an order should be made.

How much should be awarded

12. The Respondent has limited its claim to counsel's brief fee for trial of £2000, even though its overall costs are significantly more.
13. In all the circumstances, taking into account what is just and equitable, we order the Claimant to pay the Respondent £1000 towards its cost.

Employment Judge Balogun
Date: 9 December 2019