



EMPLOYMENT TRIBUNALS

Claimant: Miss A Tulipan

Respondent: Sloane Square Hotel Ltd

Decision on the Papers: Employment Judge Henderson

JUDGMENT

The respondent's application for a Preparation Time Order/Award (Costs) is refused.

REASONS

The Respondent's Application for a Preparation Time award

1. Following the Tribunal's Judgment and Reasons sent to the parties on 23 August 2019, the respondent made an application for "costs" on 29 August 2019. The respondent was not legally represented at the hearing and so the application was in fact for a preparation time order. The respondent has since confirmed (on 25 October 2019) that the application was also being made for wasted costs against the claimant's solicitors (Astute Legal)
2. On 20 September 2019, the Tribunal ordered the parties to write to the Tribunal by 4 October 2019 stating whether they considered that this application could be decided on the papers: that is without a Tribunal hearing, which would require the parties' attendance in court.
3. On 3 October 2019 Astute Legal confirmed that they were defending the claim for costs/preparation time and that they would be happy for the claim to be dealt with on the papers. The respondent confirmed on 23 September 2019 (which correspondence had been misplaced by the Tribunal) that they accepted that the application was dealt with on the papers. This was repeated on 25 October 2019.
4. The respondent submitted on 12 November 2019 a schedule of preparation time costs, indicating how such sums were incurred (see rules

75 (2) and 79 of the Tribunal Procedure Rules 2013). The Tribunal had ordered that the claimant provide no later than 14 November 2019, evidence of her ability to pay should any costs order be made. As from 25 October 2019 Astute Legal were aware that the application for costs was being made against them and not the claimant herself. Astute Legal have provided no evidence of their ability to pay though they would have had sufficient time, between 25 October -14 November 2019 to supply such information.

The Tribunal Rules on Costs/Preparation Time Orders

5. The relevant rules are at Schedule 1 of the ET (Constitution and Rules of Procedure) Regulations 2013 (The Tribunal Rules) namely rules 74-84.
6. Rule 76 of the Tribunal Rules states: That a Tribunal may make a preparation time order if it considers that a party or that party's representative acted vexatiously, abusively, disruptively or otherwise unreasonably in either bringing the proceedings or conducting those proceedings; or that the claim had no reasonable prospect of success. It is well-established that the making of a preparation time order is in the discretion of the Tribunal.

7. Rule 80 of the Tribunal Rules states:

“A Tribunal may make a wasted costs order against a representative in favour of any party (the receiving party) where that party has incurred costs- (a) as a result of any improper, unreasonable or negligent act or omission on the part of the representative; or (b) which in the light or any such act or omission occurring after they were incurred the Tribunal considers it unreasonable to expect the receiving party to pay.

Representative means a party's legal or other representative...”

The respondent's application

8. The respondent's application notes that the claimant did not succeed on any of her allegations/claims before the Tribunal and concludes that this means that the respondent did not “have a case to answer”. The respondent maintains that it was the responsibility of Astute Legal to “properly investigate their client's allegations” and if there was no evidence to support those allegations to avoid bringing ill-founded or irresponsible claims. The respondent also cited the following paragraphs of the Judgment (12, 13, 14, 17, 49 , 55 and 68) to demonstrate Astute Legal's poor conduct of the case.
9. The respondent's schedule of preparation time costs claimed £8,011 in total (being 199 hours spent at a rate of £39 per hour). The respondent was represented by its Finance Director Mr Yadam at the 3-day hearing in August 2019.

Astute Legal's Defence

10. This took the form of a general denial of all the respondent's claims. Astute Legal also noted that the Tribunal were "gracious" in allowing the respondent to defend the claim without legal representation. This suggests a lack of knowledge of how the Employment Tribunal system operates.

Conclusions

11. The Tribunal has considered the comments made in the Judgment with regard to the conduct of Astute Legal's representative at the hearing (Mr Kayibanda, who described himself as a "lawyer"). There were various delays at the commencement of the hearing, but as noted in the Judgment this was the responsibility of both parties. Indeed, the parties were reminded of their obligation to co-operate with each other to assist the Tribunal (paragraph 6). Mr Kayibanda did appear to waste time; was ill-prepared (he was not familiar with the documents or the bundles); made unmeritorious applications for postponement; failed to challenge witnesses on relevant points in cross-examination and cited irrelevant cases in his submissions. He also appeared to be unfamiliar with Tribunal practice and process generally, though he insisted that he was experienced in appearing in the Employment Tribunal.
12. However, these comments show that Mr Kayibanda was unprepared and possibly lacking in competency, but do not demonstrate that his behaviour was vexatious, disruptive, abusive or otherwise unreasonable. It may be that he was too inexperienced to conduct a case in the Tribunal and that Astute Legal should have selected their representative more carefully, but that is not the test for making an award under the Tribunal Rules.
13. As regards the respondent's contention that Astute Legal should have fully investigated the claimant's allegations and not allowed her to bring an unmeritorious claim, this is overstating the duty of a legal representative. It is often the case that legal advisers tell their clients that their cases may not succeed, but it is a matter for that client as to whether they choose to instruct their advisers to continue with the process. The respondent relies on the fact that none of the claimant's allegations were accepted by the Tribunal as indicating that they should be entitled to a preparation time award. Again, that is not the relevant test in the Employment Tribunal.
14. The respondent has not demonstrated any "improper, unreasonable or negligent act or omission on the part of" Astute Legal as required under rule 80. They could, and possibly should, have been more thorough in preparing for the Tribunal hearing, but again, that is not the relevant test.
15. Furthermore, the fact that a case does not actually succeed does not necessarily mean that there was no reasonable prospect of success: much depends on manner in which the evidence is elicited and presented and upon the quality and ability of the legal representatives. A different representative may have achieved a different result. Again, that is not the relevant consideration in an award for preparation time orders.

16. The respondent's application for costs is refused.

Employment Judge - Henderson

Date: 21 Jan 2020

JUDGMENT & REASONS SENT TO THE PARTIES ON

23/01/2020

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FOR THE TRIBUNAL OFFICE