



EMPLOYMENT TRIBUNALS

Claimant
Mrs K Kalia

- v -

Respondent
Crowe UK LLP

Heard at: London Central

On: 31 January 2020

Before: Employment Judge Baty
Ms CI Ihnatowicz
Mr I McLaughlin

Representation:

For the Claimant: In person
For the Respondent: Ms A Carse (counsel)

JUDGMENT

The respondent's costs application succeeds. An award of costs of **£20,000** (Twenty Thousand Pounds) is made, payable by the claimant to the respondent.

REASONS

Respondent's costs application

1. In a reserved judgment and reasons sent to the parties on 31 May 2019, the tribunal found that the claimant's complaints of direct disability discrimination and for failure to make reasonable adjustments were all presented out of time; that it was not just and equitable to extend time; and that the tribunal did not therefore have jurisdiction to hear any of the claimant's complaints and the claim was struck out in its entirety. The tribunal also found that, if it had had jurisdiction to hear the claimant's complaints, those complaints would all have failed.

2. By letter of 26 June 2019, the respondent made an application for costs. The judge duly directed that the application be heard at a hearing before the

same tribunal panel. That hearing was listed for today. Its sole purpose was to consider and determine the costs application.

The law

3. The tribunal's powers to make awards of costs are set out in the Employment Tribunal Rules 2013 at rules 74-84. The test as to whether to award costs comes in two stages:

1. First, has a party (or that party's representative) 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 or did the claim or response have no reasonable prospect of success? If that is the case, the tribunal must consider making a costs order against that party.
2. Secondly, if that is the case, should the tribunal exercise its discretion to award costs against that party? In this respect the tribunal may, but is not obliged to, have regard to that party's ability to pay.

4. If the amount of costs awarded exceeds £20,000, the amount to be paid must be determined by way of a detailed assessment. For amounts of £20,000 or less, no such detailed assessment is required.

5. The respondent's application was both on the basis of unreasonable behaviour in the bringing and conducting of the proceedings and on the basis that the claim had no reasonable prospect of success.

6. At the start of the hearing, Ms Carse stated that, although the respondent's schedule of costs ran to £162,195.26, the respondent would be seeking £20,000 costs only. There would, therefore, be no requirement for a detailed assessment should the tribunal be minded to make an award of costs.

7. At the start of the hearing, the judge summarised the law in relation to costs for the benefit of the claimant, who was unrepresented.

The Evidence

8. The tribunal had before it the respondent's costs application. The claimant also provided to the hearing a 17 page set of submissions (albeit only limited parts of them were relevant to the issues the tribunal had to determine). Each party also provided a short bundle of documents to the hearing.

9. It was agreed at the start of the hearing that the tribunal would read in advance the claimant's submissions and any documents to which they referred as well as the respondent's original costs application. Both parties would then have the opportunity to address the tribunal, which they did, and the tribunal also

asked a number of questions, particularly in relation to the claimant's financial means.

10. The tribunal then adjourned to consider its decision and reconvened after lunch to give the parties that decision. The judge asked the parties if they would like written reasons for the decision and the claimant said that she would.

Determination of the application

11. The reasons for the tribunal's decision are as follows.

Stage One

12. We turn first to the question of whether or not the claim or any part of it had no reasonable prospect of success or whether the bringing or conducting of the proceedings was unreasonable etc. In doing so, we cross refer in full to the detailed findings which we made in our judgment and reasons on liability.

No reasonable prospect

13. The issue of prospects falls into two categories, firstly the issue of jurisdiction (which was the reason why the claims were dismissed) and secondly the substantive issue of the prospects which the claimant's complaints had in the event that the tribunal did have jurisdiction.

14. We found that all of the complaints were out of time and that there was no reason why the claimant could not have submitted claims in time and that she had not proved that it was just and equitable to extend time. We noted that the claimant had considerable experience of employment tribunals; was contemplating bringing a claim in November 2017 when she spoke to insurers, possibly solicitors and received advice from counsel; and did know about employment tribunal time limits and what they were. We rejected the claimant's assertion that she had not been contemplating a claim until a telephone call from Ms Pennington on 18 January 2018. Furthermore, we found that the claimant's explanation for why she did not put her claim in on time was dishonest. The claimant therefore knew that the claim was out of time and that, to try and persuade us that it was just and equitable to extend time, she was putting forward a dishonest explanation. Whilst the dishonesty was not apparent to us until we had heard the evidence, the claimant knew this from the start. There was, therefore, no reasonable prospect of her establishing that it was just and equitable to extend time such that the tribunal had jurisdiction to hear her claim. The threshold at stage 1 is therefore passed in this respect and we are therefore obliged to consider exercising our discretion to make an award of costs.

15. We should add that, as well as the above indicating that the claim had no reasonable prospect of success on jurisdictional grounds, the conduct of the claimant in bringing the claim on this basis was, given the dishonesty involved, thoroughly unreasonable. On this ground too, therefore, the threshold is passed and we are obliged to consider whether to exercise our discretion to award costs.

16. In terms of the substance of the various complaints made, there were numerous allegations of direct disability discrimination and of a failure to make reasonable adjustments. We cross refer to the findings in our conclusions in our judgment and reasons on liability as a whole, where we go through each of these complaints one by one.

17. However, in summary, in relation to the direct discrimination complaints, very often the claimant could not even establish the factual allegation of less favourable treatment and clearly could not have done so from the start based on the evidence before us (one example is her complaint that Ms Ball gave her too much work, which we rejected the factual basis of). Furthermore, on the instances where less favourable treatment was established, there was no shred of evidence to suggest that anything which the respondent did was because of the claimant disabilities and there were clear non-discriminatory explanations for the reasons why the respondent did what it did. There was, therefore, no reasonable prospect of the claimant shifting the burden of proof in this respect and no reasonable prospect of these complaints succeeding. In relation to these complaints, therefore, the threshold at stage 1 is passed and we are obliged to consider whether to exercise our discretion to award costs.

18. In relation to reasonable adjustments, very often the claimant could not even establish the PCP relied on or the substantial disadvantage. In the few occasions where these were made out, she had no reasonable prospect of establishing that the adjustments which she said were reasonable were in fact reasonable. These complaints therefore had no reasonable prospect of success; the threshold at stage 1 is therefore passed and we are obliged to consider whether to exercise our discretion to award costs.

Unreasonable conduct in bringing/conducting the proceedings

19. The claimant's conduct of the proceedings in general was unreasonable. We found the claimant was dishonest in her evidence on numerous occasions; it was not merely that she was dishonest, rather it was that she was dishonest in crucial areas to her case (such as the jurisdiction issue referred to above).

20. She also behaved in an unreasonable manner in a way which disrupted the progress of the hearing: she produced additional documents at various stages during the hearing; she produced in the middle of the hearing a covert recording of a conversation which she had recorded and applied to have it included; she made a late application to have two weeks to provide written submissions, despite having known of the dates of the hearing for some considerable time previously; although this was rejected, she was given an extension of one day which caused the respondent to incur the cost of an additional day's attendance at the tribunal. We accept the respondent's submissions that the claimant behaved unreasonably in relation to the production of documents for both preliminary and final hearings. The claimant insisted on including large volumes of irrelevant documents. Her two bundles ran to 2622 and 577 pages respectively in contrast to the 849 page bundle produced by the respondent; yet it was the respondent's bundle that was predominantly referred

to at the hearing and the vast majority of the claimant's material was irrelevant and hardly referred to.

21. These examples of unreasonable behaviour by the claimant also trigger stage 1 of the test and mean that we are obliged to consider whether to exercise our discretion to award costs.

Stage Two

22. In considering whether to exercise our discretion to award costs and, if so, in what amount, we take into account anything that we consider relevant to that issue.

23. First, we note that the claimant is a litigant in person. However, she is no ordinary litigant in person who is unfamiliar with the tribunal process. She has brought previous employment tribunal proceedings (indeed she has brought proceedings which she has not only lost but which have resulted in a substantial award of costs being made against her); she has had access to legal advice during those proceedings and in relation to the present proceedings. She is, therefore, fully aware of the risks involved in employment tribunal litigation and the risk of costs awards being made.

24. The respondent made various offers to settle this litigation. The matter went through judicial mediation. There was an offer of £48,000 to settle it. Finally, there was an offer of £120,000 to settle the matter made on 19 February 2019, several months prior to the hearing. We are conscious that that offer also included agreement that her employment with the respondent would terminate. However, given the weakness of her claim, the fact that she is off sick and no longer in receipt of salary from the respondent whilst facing disciplinary charges which, in the light of the evidence which we saw during this hearing may well result in her dismissal, and the sheer size of the offer, we consider that it was completely unreasonable for her not to accept it. However, she did not accept it.

25. The costs schedule produced by the respondent, totalling around £162,000, does not appear to us to be particularly surprising given the amount of time and work which this litigation will have required and the way the claimant has conducted it. Whilst we are not required to do a detailed assessment, we have considered the respondent's schedule and do not doubt that at least the majority of these charges were properly incurred. In any event, the respondent is only seeking £20,000 of those charges; that sum is certainly entirely reasonable in the context of the work done in defending this claim.

26. Furthermore, the costs incurred as a result of the claimant's behaviour outlined at stage 1 flow from the very beginning of the proceedings as those proceedings were from the start unreasonably brought and had no reasonable prospect of success. It would be reasonable therefore to include any charges from the start of defending the claim rather than limiting it, say, to charges incurred in recent months only. However, the reasonableness of seeking 20,000 is heightened by the fact that costs well in excess of that sum have been incurred

since the offer of settlement of £120,000 expired (for example, Ms Carse's counsel's fees alone, which were incurred since that offer, total around £37,000).

27. All of the £20,000 costs sought therefore derive from the unreasonable conduct of the claimant/the unreasonable claim which she brought.

28. We turn to the issue of the claimant's means. The claimant set out in her bundle a schedule of her ongoing payments. It is clear from that that her income at present is very small. She is on universal credit. She remains employed by the respondent but she has been off sick for a long time and is no longer in receipt of any salary or sick pay. Furthermore, according to medical evidence provided in her bundle, it is not likely that she will return to work soon. She has outstanding debts of around £24,000 in the form of credit card debts and a loan. Her monthly outgoings are of around £2,444, including mortgage payments of £1,421 per month. Her outgoings therefore considerably exceed income and she could not pay these costs on the basis of her earnings going forwards. However, as she explained in response to questioning from the tribunal, she does own her own home which is worth around £400,000; she has about £182,000 outstanding on her mortgage; and she accepted therefore that she had between £210,000 and £220,000 of equity in her house. She does therefore have the assets to pay £20,000 of costs, albeit that would be at considerable hardship to her if she was unable to obtain a loan either commercially or from family and had to sell her home. Taking her means into account, therefore, she could pay these costs, which is an indicator that an award should be made where, as in these circumstances, the costs have been properly incurred and have been incurred as a result of the claimant's unreasonable behaviour/claim having no reasonable prospect of success.

29. We would add that, even if the claimant had not had the means to pay the costs, we would nonetheless have awarded them: this is because of the seriousness of this particular claimant, with all her experience of litigation, having put in this worthless claim and having behaved in the unreasonable manner set out above and in our judgment and reasons on liability. For no good reason whatsoever, the respondent has been put to completely unnecessary and very extensive expense.

30. We therefore make an award of costs of £20,000, payable by the claimant to the respondent.

Employment Judge Baty

Dated: 6th Feb 2020

Judgment and Reasons sent to the parties on:

06/02/2020

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For the Tribunal Office