EMPLOYMENT TRIBUNALS

Claimant: Mr F Kabengele

Respondent: Amazon UK Services Ltd

COSTS HEARING

Heard at: Leicester **On:** 20 January 2020

Before: Employment Judge Camp

Appearances
For the claimant: did not appear
For the respondent: Mr L Harris, counsel

REASONS

1. This is the written version of the reasons given orally at the hearing for the decision that the claimant should pay some of the respondent's costs, written reasons having been requested by both parties within the 14 day time limit.

2. This is a costs hearing. The claimant is not here. I don't know why.

3. The main basis of the respondent's costs application is rule 76(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;*

4. I dealt with this case at a final hearing with Members in Leicester and Nottingham in late April 2019. Our reserved decision, with full written reasons, was sent to the parties on 29 July 2019. The claimant's claim failed entirely.

5. The claimant had intimated that he was going to appeal the judgment, but it seems no appeal has been made. He did apply for reconsideration, on 12 August 2019, and my decision dismissing the reconsideration application (without a hearing in accordance with rule 72(1) on the basis that there was no reasonable prospect of the original decision being varied or revoked) was sent to the parties on 15 August 2019.

6. I refer to both the original reserved judgment, and the reconsideration judgment, and the reasons for them, by way of background.

7. By way of further background, there was a preliminary hearing before Employment Judge Britton on 12 and 16 November 2018 at which the Employment Judge struck out a couple of complaints and ordered deposits in relation to all of the claimant's other complaints. The deposit order was dated 4 December 2018 and was sent to the parties on 6 December 2018. The claimant was ordered to pay a £5 deposit in relation to each allegation not later than 28 days from the date the order was sent and he did so.

8. The reasons for making the deposit orders include, around paragraph 28 of Judge Britton's Reasons, the assertion that the claim had little reasonable prospect of success, essentially, because:

    8.1 the one thing that the claimant might rely on in order to prove that the reason for the treatment was race was that somebody had told him that the woman identified as the main perpetrator of discrimination had made a particular comment;

    8.2 there seemed to be scant evidence that she made that comment.

9. One of the bases upon which we ultimately decided the case against the claimant was the same: we were not satisfied that that comment was made; we decided that that comment was the only thing that might conceivably have reversed the burden of proof pursuant to section 136 of the Equality Act 2010 – it was the only thing that might have satisfied us that the reason the claimant was treated in the way he was treated was his race.

10. So far as concerns the rest of Employment Judge Britton's decision in relation to deposits, suffice it to say that the reasons why the claimant ultimately lost at the final hearing mirrored, to a substantial extent, the reasons why Judge Britton made the deposit order.

11. We are therefore in a situation where, in accordance with rule 39(5)(a), "*the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown*", the "*paying party*" here being the claimant, the "*specific allegation or argument*" being the allegations in relation to which the deposit order was made, and the allegations in relation to which the deposit order was made being every single allegation of discrimination or victimisation that was not struck out by Employment Judge Britton.

12. In other words, because the claimant has persevered with the claim after the deposit order had been made and has lost on essentially the same basis the deposit order was made (or, at least, a significant part of the reasons why the claimant lost included the reasons for which the deposit order was made), then the claimant is deemed to have acted unreasonably for the purposes of rule 76 – unless the contrary is shown – and a costs order may be made under rule 76. The Tribunal still has a discretion as to whether or not to make a costs order, but what is normally the biggest hurdle in the way of obtaining a costs order – showing unreasonable conduct – has been overcome.

13. The "*contrary is*" not "*shown*"; I know of nothing making it reasonable for the claimant to continue with this claim in the teeth of the deposit orders.

14. The respondent made an application for costs under cover of an email of 13 August 2019. The application was made on a number of different bases, the most straightforward of which is the basis upon which I have actually made the deposit order, namely unreasonable conduct because of rule 39(5).

15. At the start of the hearing, I indicated to Mr Harris, respondent's counsel, that provisionally, based on what I had read, my view was that a deposit order should be made on that basis; but that no other costs should be ordered. My provisional view ended up being my final view.

16. I have a discretion to make a costs order or, even where the claimant has acted in the most unreasonable way possible, not to make a costs order. To explain why I think it is appropriate for me to exercise my discretion in the respondent's favour and make a costs order, it is necessary to set out some of the procedural history of the costs application itself.

17. The email applying for costs was referred to me and I directed that the following orders should be made:

    1. *within 28 days* [by 12 September 2019; these orders were made on 15 August 2019] *the claimant must provide his written response to the application, setting out in detail his reasons for why a costs order should not be made, including any relevant information as to his financial means;*
    2. *within a further 14 days, i.e. within 6 weeks of the date of this order, both parties must let the tribunal know in writing what their views are: as to how long any costs hearing should be; as to whether the costs hearing should be dealt with by the full tribunal that dealt with the final hearing or whether they are content for it to be dealt with by Employment Judge Camp sitting alone; as to what further case management orders, if any, should be made to deal with the respondent's costs application.*

18. The reason for suggesting that costs could be dealt with by me sitting without Members was purely practical. There is no impediment in the Rules. However, all other things being equal, a costs hearing following a final hearing would normally be dealt with by the full tribunal that dealt with the final hearing. But getting a date when me and both members can attend which is also convenient to the claimant and respondent can sometimes be quite tricky. It seemed to me we would probably get a costs hearing sooner if it was just dealt with by me alone. Had the claimant written saying he was not happy for it to be dealt with by me alone, I would have directed that it be heard by the three of us who dealt with the final hearing.

19. Nothing came from the claimant in response to that order; he completely failed to comply with it.

20. There was a small amount of delay in referring the claimant's non-compliance with the application to me. The respondent's solicitors wrote to the tribunal on 1 October 2019 highlighting the claimant's non-compliance and saying that they were happy for the costs application to be dealt with by me sitting alone. I then decided to make an unless order against the claimant, in these terms:

> *Unless the claimant complies within 10 days with orders 1 and 2 of 15 August 2019 he will be debarred from defending the respondent's costs application without further order, i.e. the costs hearing will still take place, but he will not be permitted to rely on any evidence at that hearing and will only be entitled to participate in that hearing to the extent permitted by the tribunal. Amongst other things, the claimant must state whether he objects to the costs hearing taking place before Employment Judge Camp sitting alone and, if he does, what his objections are.*

21. The unless order was emailed out on 9 October 2019, so the 10 days would have expired on 19 October 2019. The claimant did not comply and accordingly the unless order took effect. The matter was unfortunately not referred to me for a little while, but on 26 November 2019, at my direction, the parties were written to in the following terms on 26 November 2019, in accordance with the second sentence of rule 38(1):

> 1. *my order has not been complied with, within the 10-day time limit or at all, and the unless order therefore takes effect;*
> 2. *this means that the claimant is debarred from defending the respondent's costs application, i.e. the costs hearing will still take place, and he can still come to it, but he will not be permitted to rely on any evidence at that hearing and will only be entitled to participate in that hearing to the extent permitted by the Tribunal;*
> 3. *given that no one has objected, the hearing will be before Employment Judge Camp sitting alone.*

22. The claimant has not attended today. I do wonder whether he is actually still at the address which he originally gave, but we have not had any returned post from that address, or any bounce-back from the email address that we were using. It may be that he has gone back to France. Be that as it may, I can only deal with this on the basis of the evidence that I have. The evidence I have in relation to costs from the claimant's side is non-existent.

23. Had the claimant come along to this hearing, notwithstanding his non-compliance with the unless order, I would very likely have been willing to consider any evidence he presented, at least as to his financial means. His financial means are relevant and although the Rules say I "*may have regard to*" them, I am, in practice, in accordance with EAT case law, obliged to take them into account.

24. As to why it is appropriate for me to make a costs order, I first think about the claimant's ability to pay. There is, though, no evidence at all, or even information, about his financial means. The claimant has twice been asked for this. He simply failed to respond. He has managed to get himself effectively debarred from defending. It is his choice not to provide information, evidence and submissions. I therefore assume that his means are reasonable and that his ability to pay affects neither whether a costs order should be made nor the

amount of any costs order (although the amount of the costs order is going to be a matter for another day).

25. Secondly, the claimant pursued all of his claim that he could in the teeth of the deposit order. A deposit order is supposed to make somebody think twice about their case; to make somebody think really very carefully as to whether or not it is worthwhile continuing to pursue a claim or part of a claim that is very weak indeed. In these proceedings, the preliminary hearing where the deposit order was made followed a preliminary hearing (coincidentally in front of me) where I identified potential weaknesses in the claimant's case and where, if memory serves, I set up a deposit / strike out hearing on the basis that there did not seem to be very much in what the claimant told me from which a Tribunal could infer that discrimination or victimisation had taken place. The claimant had, then, already been warned about the weaknesses of his case before the deposit order was made and that order was a further 'shot across the bows'.

26. Unfortunately, it appeared during the final hearing and from his reconsideration application that that claimant had still not got his head around the fundamentals of the claim. The problem he had is that what he was complaining about was that he had been singled out. That was what he kept saying, in various different ways. The overwhelming majority of his colleagues – most of the people he was saying had been more favourably treated than him – were also black. This made it improbable that the reason for any less favourable treatment was that he is black. If almost all of the comparators, or potential comparators, are the same race as you, then the reason why they are more favourably treated than you is unlikely to be race. It is not impossible, but highly unlikely. A race discrimination case is not about an individual being treated badly for some reason peculiar to themselves. The reason for the treatment has to be that individual's race. The claimant just did not – would not – get this.

27. As for the victimisation claim, there really was nothing to that at all other than the claimant's belief that the reason for particular treatment was him complaining of discrimination. That is how it emerged at trial. It was hopeless.

28. It was not that the claimant did not understand what he was being told, I do not think. He is clearly an intelligent and knowledgeable man. It was that he was not prepared to accept that there could be any good reason for him being – in his eyes – mistreated other than the fact of his race. So, he stubbornly pursued the claim. He was given costs warning letters from the respondent – I shall go into these in a moment; a deposit order was made; he had been warned at a previous preliminary hearing that he needed to address this part of his case and did not really do so.

29. By rule 39(5)(a), the claimant is deemed to have acted unreasonably. He has chosen not to provide information and evidence to the effect that he would be unable to pay if a costs order were made. In all the circumstances, I can see no good reason not to exercise my discretion to award costs in the respondent's favour against the claimant. So that is what I do.

30. I shall now explain why I am not accepting the rest of the respondent's costs application.

31. The respondent is seeking its entire costs of the proceedings, or least its costs from the date when it sent its first costs warning letter. The case that has been put forward on the respondent's behalf by Mr Harris of counsel as to why additional costs should be awarded over and above those I have in fact awarded is, essentially, that it was unreasonable conduct for the claimant to pursue the claim, at least after the first costs warning letter.

32. The first costs warning letter was 31 August 2018. It refers to what I said at the preliminary hearing. It offered a plain 'drop hands' settlement. It is not a very detailed letter, but there is nothing wrong with it. It says, essentially, that, for the reasons highlighted by me at the preliminary hearing, the claim is just not going to succeed.

33. There was a second costs warning letter, sent on 23 October 2018. It goes through the claim in more detail; it also highlights various things which I said during the preliminary hearing and it sets out in clear terms why, in the respondent's solicitors' submission, the claim has no reasonable prospect of success. It warns the claimant that the respondent will be seeking its costs and it offers to 'drop hands', but also says that if the claimant withdraws the respondent will write off a debt of £3,977.94 plus interest, which the claimant allegedly owed the respondent.

34. Both costs warning letters were sent before the deposit and strike out hearing. If the decision of Employment Judge Britton at that hearing had been that the entire claim should be struck out on the basis that it had no reasonable prospect of success, then I think the respondent would have been in a strong position to argue that they should have their costs from 31 August 2018 onwards because of the costs warning letter of that date. But the default position in the Tribunal is no costs; we have a no costs regime. The costs rules envisage that people can get their costs if a claim has no reasonable prospects of success. I think that what the respondent is trying to do here – and I am not criticising the respondent for attempting this – is to persuade me that it is unreasonable conduct to pursue a claim that has little reasonable prospect of success where a costs warning letter has been sent. That is not what the Rules say.

35. It does not follow from the fact that someone has lost and lost badly that their claim was misconceived from the start. I have to think about costs and prospects of success without the benefit of hindsight. Another Judge – Employment Judge Britton – looked at the case without that benefit in 2018 and he decided that only small parts of it had no reasonable prospect success and that most of it did have little reasonable prospects of success. Except where rule 39(5) applies, it is not unreasonable conduct to pursue a claim with little reasonable prospect of success and pursuing a claim with little reasonable prospect of success does not in and of itself trigger a liability for costs.

36. I appreciate that the respondent would rather the employment tribunal rules on costs were not as they are, but I cannot say that it was unreasonable for the claimant to continue with the claim up to the point where the deposit order was made. The deposit order resulted from a thorough assessment of the prospects of success by an independent Employment Judge. It told the claimant, or should have told him, that, in all probability, he was not going to win. At that point, it became unreasonable for the claimant to continue, but not before, it seems to

me. Before the deposit order was made, this was no different from any other case where a claimant is pursuing a weak but not completely hopeless claim.

37. Given the costs rules and regime we have, I do not think it is appropriate, in my discretion, to award costs against the claimant before the point in time when the deposit order was made and took effect. That is why I made the order that I have made.

38. **Addendum** [not part of the Reasons given orally]:

    38.1 Rule 39(5)(b) requires the deposits to be paid to the respondent.

    38.2 The costs order relates to costs from 3 January 2019 onwards because that is the date when claim would have been struck out in accordance with rule 39(4) had the claimant not paid the deposits. My thinking was, as above, that the claimant ought to have taken stock after the deposit order was made and that the reasonable thing for him to do would have been not to have paid them.

    38.3 As discussed during the hearing, I have sent this to the County Court for detailed assessment because it was impracticable, given the material I had, for me to do any kind of proper assessment of costs from 3 January 2019 onwards, because the respondent was unwilling to limit its costs claim to £20,000, and because I think the County Court is better equipped than the Tribunal to carry out the detailed assessment of costs.

Employment Judge Camp

25th February 2020

Sent to the parties on:

For the Tribunal: