



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Mr J Tapi

and

Respondent

John Lewis plc

Held at Reading on

21 February 2020 (In chambers – parties not attending)

Employment Judge

Vowles

Members:

Ms H Edwards

Ms C Carr

DECISION ON THE RESPONDENT'S APPLICATION FOR A COSTS ORDER

1. The Respondent's application for a costs order is granted. The Claimant is ordered to pay £13,908.80 towards the legal costs of the Respondent.

REASONS

BACKGROUND

1. At a hearing at Reading Employment Tribunals on 29 and 30 July 2019, the Claimant's claims of direct race discrimination and indirect race discrimination both failed and were dismissed.
2. After the Tribunal announced its decision giving oral reasons on 30 July 2019, the Respondent made an oral application for a costs order based upon the Claimant's alleged unreasonable, scandalous and vexatious conduct in bringing and conducting the proceedings.
3. The Claimant failed to return to the Tribunal after the lunch break to respond to the application. The Tribunal considered that in these circumstances, the interests of justice would be best served by making a case management order requiring the Respondent to send to the Tribunal and to the Claimant a written application for a costs order accompanied by any relevant supporting documentation.
4. The Claimant was also ordered to provide a written response to the application with reasons why a costs order should not be made against him and details of his financial means and ability to pay such an order.

5. The Judgment and the case management order were sent to the parties on 22 August 2019.
6. On 19 September 2019 the Respondent presented a written costs application.
7. The Claimant failed to provide any response to the Respondent's application or to the Tribunal's case management order.
8. Neither party has requested a hearing and the Tribunal therefore proceeded to consider the Respondent's application on the papers.

EVIDENCE

9. The Tribunal considered the following documents:
 - ET1 claim form presented on 16 January 2018
 - ET3 response form presented on 12 March 2018
 - Case management orders made on 25 September 2018
 - Deposit orders made on 25 September 2018
 - Employment Judge reasons given on 25 September 2018
 - Unanimous judgment dated 22 August 2019
 - Case management order dated 22 August 2019
 - Respondent's written application for costs order dated 19 September 2019

RELEVANT LAW

10. References to rules below are to rules under Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

Rule 75(1) - A costs order is an order that a party (the paying party) make a payment to - another party (the receiving party) in respect of the costs that the receiving party has incurred while legally represented or while represented by a lay representative;

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

Rule 39(5) – If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order-

- (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, and*
- (b) *The deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders), otherwise the deposit shall be refunded.*
11. The Tribunal rules impose a two stage test when a Tribunal considers an application for a cost order. First the Tribunal must ask whether a party's conduct falls within rule 76(1)(a) or (b). If so, the Tribunal must then go on to ask whether it is appropriate to exercise the discretion in favour of awarding costs against that party.
12. Gee v Shell UK Limited [2003] IRLR 82. The Court of Appeal confirmed that it is a fundamental principle that costs are the exception rather than the rule and that costs do not follow the event in Employment Tribunals.
13. McPherson v BNP Paribas [2004] ICR 1398. In determining whether to make an order under the ground of unreasonable conduct, a Tribunal should take into account the "*nature, gravity and effect*" of a party's unreasonable conduct.
14. Barnsley Metropolitan Borough Council v Yerrakalva [2012] ICR 420. The vital point in exercising the discretion to order costs is to look at the whole picture. The Tribunal has to ask whether there has been unreasonable conduct by the paying party in bringing, defending or conducting the case, and, in doing so, identify the conduct, what was unreasonable about it, and what effect it had.

UNREASONABLE CONDUCT

15. At the preliminary hearing on 25 September 2018, the Employment Judge made two deposit orders in respect of the claims of direct discrimination (£100) and indirect race discrimination (£150). The reasons for the orders were as follows:
- "The Claimant is unlikely to be able to show that there are facts from which it could be decided, in the absence of any other explanation, that a person the Respondent applied stereotypical view of black people as being inarticulate.*
- It is more likely than not the Respondent will be able to show that if it applied the PCP relied on by the Claimant that it was a proportionate means of achieving a legitimate aim."*
16. The Claimant paid a deposit of £250 on 1 November 2018 and both claims therefore proceeded to the hearing referred to above.

17. The Tribunal considered whether its decision on the specific allegations of direct race discrimination and indirect race discrimination were decided against the Claimant for substantially the reason given in the deposit order.

18. The reasons given orally for the decision on the direct race discrimination claim included:

“Applying that law and its principles, the Tribunal could find no evidence upon which it could find, or infer, that the Claimant’s rejection for employment was because of his race. There was nothing which would cause the burden of proof to shift to the Respondent. On the contrary, the Tribunal found that the Respondent’s evidence, both documentary and on oath, provided cogent evidence of a non-discriminatory reason for the rejection, namely that the Claimant had performed poorly at interview and presentation, and scored the lowest overall amongst the seven shortlisted candidates.”

19. The reasons given orally for the decision on the indirect race discrimination claim included:

“The Tribunal found no evidence to support this claim that the application of the partnership behaviours in the selection process put, or would put, people or BME people at a particular disadvantage or allowed bias to enter the selection process. And the Claimant did not put forward any evidence to support a group particular disadvantage for black people in particular or for BMEs generally. And there was no evidence that the Claimant himself was put at a disadvantage by the application of the partnership behaviours in the selection process. He was disadvantaged by his low scores through the recruitment process, and not by his race as found above in the direct race discrimination claim.”

20. In summary, the Tribunal said:

“In summary, the Tribunal finds that the Claimant’s claims of direct and indirect race discrimination were based solely upon unfounded perceptions, unsupported by any reliable evidence. The Respondent, for its part, has provided clear, cogent evidence of entirely non-discriminatory reasons for their treatment of the Claimant and of other BME people.”

21. The Tribunal finds that the claims failed for substantially the reasons given in the deposit order quoted above.

22. Accordingly, under rule 39(5)(a), the Claimant is to be treated as having acted unreasonably in pursuing those claims for the purposes of rule 76. No evidence to the contrary has been provided to overturn that presumption.

23. The Tribunal therefore proceeded to consider whether it was appropriate to make a costs order in this case in view of the Claimant’s unreasonable conduct.

24. The Claimant has not responded to the case management order of 22 August 2019 ordering him to provide a written response to the Respondent's application with reasons why a costs order should not be made against him.
25. Attached to the Respondent's application were copies of three costs warning letters sent to the Claimant on 27 March 2018, 16 November 2018 and 24 July 2019. In each letter, the Claimant was informed that the Respondent took the view that his claims had no reasonable prospect of success, setting out the reasons why they reached that view and stating that if he continued to pursue the claims, an application would be made for a costs order against him.
26. The Tribunal also took account of the relevant parts of the reasons given by the Employment Judge at the preliminary hearing on 25 September 2018 for deciding that the claims had little reasonable prospect of success and the reason why he was making a deposit order.

7 The Claimant's case has little reasonable prospect for success as a claim for direct discrimination for the following reasons:

7.1 An employer must not discriminate against a person applying for employment in the arrangements the employer makes for deciding to whom to offer employment; as to the terms on which the employer offers the applicant employment; by not offering the applicant employment. ...

7.2 ...

7.3 ...

7.4 ...

7.5 In this case the Claimant says that there was a "biased ... predisposition, held by interviewer(s) in the Respondent's employ ... with a stereo typical view of blacks as being 'inarticulate'; a presumptive view was held against the Claimant."

7.6 The Claimant does not relay any specific events that occurred during the recruitment process save that the Claimant refers to the subjective nature of the questions asked which the Claimant says allowed for the stereotypical views to be able to come into play.

7.7 The Respondent points to the outcome of the application process. The Respondent says that of 7 original shortlisted candidates 3 were white and 4 BME (one of whom was the Claimant). Initially offers of employment were made to two of the 2 BME candidates and 3 white candidates. The one of the persons to whom the original offer was made (it is not clear from which group) refused the offer of employment and an eighth candidate who was black (from outside the original 7 shortlisted) was appointed.

- 7.8 *While the matters set out above indicate that this is not an obvious case direct discrimination on the grounds of race, if “a stereo typical view of blacks as being ‘inarticulate’” was applied to Claimant the Claimant will succeed in his claim. Whether such a stereotypical view was applied to the Claimant will depend on the findings Tribunal hearing the case. It is for the Tribunal to consider the evidence as a whole and to make findings of primary fact on the basis of direct evidence or by reasonable inferences from primary facts established by the evidence or not contested in the evidence whether this is established by the Claimant.*
- 7.9 *It is therefore not appropriate to strike out the case. However, I am satisfied that on the basis of the information before me that the claim has little reasonable prospect of success.*
- 8 *The Claimant’s claim of indirect discrimination has little reasonable prospect of success, for the following reasons:*
- 8.1 *An employer discriminates against an applicant if the employer applies to the applicant a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of the applicant’s.*
- 8.2 ...
- 8.3 *The Claimant has identified the PCP as the Partnership Behaviours, as set out in paragraph 8 of the Respondents grounds of resistance.*
- 8.4 *The Claimant says that the PCP puts, or would put, persons with whom the Claimant shares the characteristic (race: “black man”) at a particular disadvantage when compared with persons with whom the Claimant does not share it. The evidence upon which the Claimant bases this contention is unclear, the Claimant appears to be seeking to rely on an assumed stereotypical view of black men. The Claimant says it puts him to that disadvantage.*
- 8.5 *The nature of the disadvantage was not entirely clear to me, but it appears to arise from what the Claimant says is a requirement to make a presentation and the application of the Partnership Behaviours. The Partnership Behaviours as set out in paragraph 8 of the grounds of resistance are in my view on their face benign. The requirement of the Respondent to ask applicants for employment to make a presentation is itself also a standard recruitment practise. The Respondent in my view is likely to be able to show that the application of the PCP is a proportionate means of achieving a legitimate aim.*
27. At the full merits hearing, the Claimant did not challenge the evidence of the Respondent’s witness to any significant extent. He asked the Respondent’s witness Mrs Neary (one of the 2 managers who interviewed the Claimant) only one question, about the time period of refresher training

on diversity. The Respondent's evidence in response to the substance of the Claimant's claims was therefore unchallenged.

28. Finally, the Tribunal also took account of its summary quoted above that the claims were based solely upon the Claimant's unfounded perceptions, unsupported by any reliable evidence.
29. In the circumstances described above, the Claimant should have been aware that his claims would fail. The Respondent was to put to the wholly unnecessary expense of defending claims which the Claimant had been told clearly by an Employment Judge had little reasonable prospect of success and by the Respondent in three letters that the claims had no reasonable prospect of success.
30. In these circumstances, the Tribunal finds that it is appropriate to make a costs order against the Claimant.

AMOUNT OF COSTS ORDER

31. The case management order dated 22 August 2019 ordered the Claimant to provide details of his financial means and ability to pay a costs order. As stated above, the Claimant did not respond to the case management order.
32. The only information the Tribunal had regarding the Claimant's financial means was in his statement of loss dated 5 November 2018 which stated that he was in work as at 3 September 2018 although a later amendment dated 7 November 2018 said that had been stated in error and that his job had now ceased.
33. The Tribunal therefore had nothing else on which to base the Claimant's ability to pay as at July 2019 except that he had been given the opportunity in the case management order to provide evidence of his ability to pay and he did not respond to say that he could not pay a costs order. The Tribunal found that there was no reason to decline to make a costs order based upon the issue of ability to pay.
34. The Respondent's claim for costs was set out in an itemised schedule.
35. The total was £18,985.70 reduced by £3,000 excluding items (1), (2) and (3). The Tribunal considered that items (4), (5), (6) and (7) should also be excluded as they related to costs leading up to and incurred at the preliminary hearing on 25 September 2018. Thereafter, the Claimant had failed to heed the warnings he had been given by the Employment Judge and by the Respondent. The Tribunal considered that it was appropriate to award the Respondent's legal costs incurred thereafter.
36. Accordingly, the claim for £15,985.70 was reduced by £1,826.90 for items (4), (5), (6) and (7) and also reduced by the £250 deposit which was forfeit

to the Respondent under rule 39(5)(b). The deposit is required to count towards the settlement of a costs order under rule 39(6).

37. Accordingly, the total amount of the costs order is £13,908.80.

PUBLIC ACCESS TO EMPLOYMENT TRIBUNAL JUDGMENTS

38. The parties are informed that all judgments and reasons for judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the Claimant and Respondent.

Employment Judge Vowles

Date: 20 March 2020

Sent to the parties on:

24 April 2020

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For the Tribunal Office