



EMPLOYMENT TRIBUNALS

Claimant: Ms K Williams

Respondent: All Health Matters Limited

JUDGMENT

The Respondent's application for costs is refused.

REASONS

1. The issue for determination is whether the Tribunal should award costs against the Claimant upon the Respondent's application. This matter has been considered on the papers without recourse to the time and expense of a hearing.
2. Rule 76(1) of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 provides that a Tribunal may make a costs order, and shall consider whether to do so, where it considers that:
 - 2.1. 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 the proceedings (or part) have been conducted; or
 - 2.2. any claim or response had no reasonable prospects of success.
3. Thus the Rules provide that a Tribunal must apply a two stage test: firstly, to determine whether the circumstances set out in paragraphs (a) or (b) of Rule 76(1) apply; if so, secondly the Tribunal must exercise its discretion as to whether a costs order should be made and, if so, for how much.
4. Case law makes it clear that claims of public interest disclosure are akin to discrimination claims. It is well recognised that obtaining evidence of discrimination is often difficult and that a Claimant will often rely on being able to show, through cross examination of witnesses, that the employer's stated

reasons for the treatment complained of were not in fact the true reasons; see London Borough of Lewisham v Oko-Jaja EAT 417/00; also Saka v Fitzroy Robinson Ltd EAT 0241/00.

5. The Tribunal's conclusion as to whether the Claimant made a public interest disclosure is dealt with in paragraph 81 and 83 of the Tribunal's judgment. The Tribunal reached its conclusion on the balance of probabilities having heard evidence from the witnesses. In the Tribunal's judgment, it was an issue the Claimant was entitled to put before the Tribunal for determination. The fact that the Tribunal found in the Respondent's favour does not necessarily lead to the conclusion that the claim was brought unreasonably or that it had no reasonable prospects of success. In the Tribunal's judgment, the thresholds set out in Rule 76(1) (a) and (b) have not been reached in this case.
6. The Tribunal notes that in Gee v Shell UK Ltd 2003 IRLR 82 CA it was said that costs in Employment Tribunals are still the exception rather than the rule. The Tribunal has also had regard to McPherson v BNP Paribas (London Branch) [2004] IRLR 558 in which the Court of Appeal held that in exercising its discretion to award costs, a Tribunal must have regard to the nature, gravity and effect of the unreasonable conduct. It was also held in that case that unreasonable conduct is both a precondition of the existence of the power to make a costs order and is also a relevant factor to be taken into account in deciding whether to make a costs order and the form of the order. The Tribunal has also considered Barnsley Metropolitan Borough Council v Yerrakalva [2012] IRLR 78, a case decided in the Court of Appeal, in which Lord Justice Mummery said that the vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and ask whether there was unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, identify the conduct, what was unreasonable about it and what effects it had.
7. The Tribunal has had regard to the Respondent's letter of 17 January 2019 putting the Claimant on warning that a costs application might be made. However, that is only one factor the Tribunal must consider: Kopel v Safeway Stores plc IRLR 753. Looking at the whole picture, nature, gravity and effect of any unreasonableness in bringing the claim, even if the threshold had been reached, the Tribunal would not be minded to exercise its discretion to award costs in this case. Evidence adduced at the hearing relating to the alleged public interest disclosure fell to be considered alongside and overlapped considerably with the evidence relating to the alleged unfair dismissal. Although not a reason for the decision in this judgment, it is noted that the Claimant was successful in that latter claim.
8. For these reasons the Respondent's application is refused.

Note

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employmenttribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Employment Judge Pritchard

Date 16 July 2020