Case Number: 3331001/2018

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr D Warburton	**v**	Chief Constable of Northamptonshire Police

JUDGMENT

Employment Tribunal Rules of Procedure – Rule 76 and Rule 80

Having considered the written submissions provided by the parties' representatives received in accordance with paragraph 59 of the Tribunal's judgment dated 24 February 2020, Employment Judge Johnson has decided the following:

1. the claimant's application for a costs order arising from the respondent's application for a stay which was heard by Employment Judge Brown on 29 November 2019 is successful as it had no reasonable prospects of success in accordance with Rule 76(1)(b). This means that a cost order is made against the respondent who shall pay the claimant the sum of **£1,590.98**;

2. the respondent's other two applications which were heard by Employment Judge Brown on 29 November 2019 relating to an amendment and a deposit order were reasonably made and are not subject to the cost order.

3. the claimant's application for a costs order in accordance with Rule 76(1)(a) is unsuccessful and is dismissed; and,

4. the claimant's application for a wasted costs order in accordance with Rule 80 is unsuccessful and is dismissed.

REASONS

Background

1. The Tribunal's judgment on liability following the hearing in the Cambridge Employment Tribunal on 6, 7 and 8 January 2020 was that the claimant's

complaint of victimisation by reason of making a protected act on grounds of disability was not well founded.

2. The parties' representatives were ordered to provide written submissions within 14 days of the date of the judgment being sent to them concerning the claimant's application for costs originally raised at the preliminary hearing before Employment Judge Brown on 29 November 2019 and it is noted that the judgment was sent on 2 March 2020.

3. Both parties representatives' provided written submissions by email on 13 March 2020, with the respondent's representative providing further submissions on 7 April 2020.

4. As this application related to a matter which was heard by an Employment Judge sitting alone prior to the liability hearing before a gull Tribunal, this application has been heard by Employment Judge Johnson sitting alone on the papers provided by the parties. Written submissions have been provided by both parties at my request and have been considered before I made my decision.

Discussion of the Submissions

5. On 29 November 2019, Employment Judge Brown considered an application made by the respondent:

   (i) To amend its response, to deny that the claimant had done a protected act;
   (ii) For a stay of the claim, pending the determination of the claimant's claim against Hertfordshire Constabulary; and,
   (iii) For a deposit order in respect of the claimant's contention that he was subject to unlawful victimisation.

6. Employment Judge Brown determined (in summary):

   (i) The respondent be permitted to amend its claim. However, he concluded that such an argument had little prospect of success;
   (ii) There should be no stay in these proceedings, primarily due to the proximity of the final hearing in this case, while the potentially linked claim brought by the claimant against Hertfordshire Constabulary had at that stage, not been listed for a final hearing. In any event, he felt that the stay would resolve or simply the issues for the Tribunal in this case, to decide; and,
   (iii) That he would not order that the claimant make a deposit order. He felt that while *'…there was some apparent force in the respondent's submissions…I was not ultimately persuaded that the claim or any particular contentions within it had only little prospect of succeeding'.* He concluded by saying that that this decision '*…is not a positive conclusion that the claim in fact has more than little prospect of succeeding (and so should not be thought to insulate*

the claimant from any application for costs), only a conclusion that the respondent did not persuade me today that it did not.'

7. He concluded that the claimant's application for costs of that preliminary hearing '*should be deferred for consideration at the end of the final hearing: the respondent was successful in its application to amend (in the face of resistance from the claimant, though I realise that this was not the real battleground of today, on which the claimant succeeded) and whether the claimant is ultimately successful or not may be a material consideration in the exercise of the Tribunal's discretion on costs.'* He also declined the to order a deposit order in respect of the new ground resistance arising from the respondent's successful application to amend.

8. Due to insufficient time being available upon the conclusion of the final hearing for an oral judgment to be given, there was no time available for the Tribunal to hear submissions from the parties concerning costs and accordingly, the judgment made an appropriate order for submissions to be provided in writing.

9. The initial submissions made by the respondent on 13 March 2020 were described as being '*broad submissions'* and permission to file a further substantive response was requested once the claimant had provided his submissions as to costs. The reason for this request was that the claimant did not have an opportunity to make detailed submissions at the preliminary hearing before Employment Judge Brown and additionally, no statement of costs had been provided by he claimant at the time of the respondent's submission on 13 March 2020.

10. Essentially, the arguments advanced in these '*broad submissions'* was that the application for costs made by the claimant related to the preliminary hearing and the respondent was successful with his application to amend. In their view, this was the central part of the application, with the application for the stay being described as *'tangential'*. It was also argued that the application had a real prospect of succeeding and therefore the claimant's application for costs was misconceived.

11. The claimant's representatives provided their submissions on 13 March 2020 and summarised the relevant rules of procedure and case law with regards to the manner in which proceedings are brought, disruptive conduct, unreasonable conduct and wasted costs. Their view was that the respondent's timing of its applications was designed to be disruptive, knowing that at the point it was made, the claimant would have largely completed the preparation of witness evidence in accordance with the existing case management orders. It was submitted that the respondent had known of other claims being brought by the claimant against Hertfordshire Police and Avon and Somerset Police by August 2018 and could have made its application when preparing its response.

12. The claimant's representative submitted that the respondent knew that the claimant would be put to additional cost in objecting to its applications and preparing for the preliminary hearing before Employment Judge Brown.

13. It was also argued that the respondent had made a dishonest application in that they made speculative assertions to support their application concerning the claimant's other claims, which was unsupported by evidence. It was also asserted that spurious allegations were made regarding the claimant making disingenuous applications for employment.

14. Finally, it was argued that of the 3 applications brought by the respondent at the preliminary hearing, 2 were unsuccessful, with the successful application to amend being described as introducing a claim which had little prospect of succeeding by Employment Judge Brown. Specific reference was made to paragraph 54 of my judgment and the finding that the claim brought by the claimant against Hertfordshire Police was covered by section 27(2) of the Equality Act 2010. On this basis, the claimant argued that the applications achieved nothing and therefore they put the claimant to unnecessary expense.

15. A costs summary was provided by the claimant in respect of solicitor's costs of £3,857.00 plus VAT and counsel's fees of £1,000 plus VAT.

16. As promised, the respondent's representative provided a response to the claimant's written submission on costs. The application identifies the legal questions that must be considered under Rule 76.

17. It is argued that the claimant's representative was 'unreasonably selective' in providing a chronology and that at the time the respondent prepared its response, it was unaware of the extent of the claimant's claims. It asserted that it did not begin to know about these other claims until 21 May 2019, but due to a change of solicitor at or around this time, there was a delay before an application was made. In any event, it was also argued that the respondent did not become aware of a strike out and deposit order being made in the Hertfordshire case until 11 September 2019. This they say, explains why the respondent could not make its applications until 18 September 2019.

18. The respondent argues that it would not be sensible to make an application which was deliberately disruptive as they would be aware that this would prejudice the prospects of success in application that they wished to make. They in turn argue that the claimant unreasonably refused to consent to the application to amend, even though it caused no prejudice and where any variation to the date for exchange of witness evidence could have been agreed by the parties.

19. The respondent strongly disputes the claimant's assertion that the application was dishonest and that its applications had been based upon information that it had received. Following a number of lengthy submissions, the respondent argues that the claimant seeks costs '…on

the civil basis, namely; having heard all the evidence, the Tribunal did not draw the adverse inference'. They argue that in Tribunal proceedings, this is contrary to way costs should be considered and that the claimant has not shown that the respondent had no real prospect of success with regards to the application allowed.

20. Submissions are also made regarding the claimant's wasted costs application, namely that the claimant failed to provide the necessary elements to seek such an order under Rule 76 and it its therefore inadequately particularised.

21. Finally, the respondent asserts that the costs sought in respect of solicitor's time are excessive, especially when taking into account the involvement of counsel.

The Law

22. The relevant part of Rule 76 of the Employment Tribunals Rules of Procedure 2013 provides that:

'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 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 prospects of success;….'

23. Rule 80 provides:

'80-(1) A Tribunal may make a wasted costs order against a representative in favour of any partry ("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 of any such act or omission occurring after they were incurred, the Tribunal considers it unreasonable to expect the receiving party to pay.

24. A number of cases were referred to by Berry Smith in their submissions to the Tribunal concerning the claimant's application for costs. Firstly, in relation to the manner in which proceedings are brought, the Court of Appeal case of ***Barnsley MBC v Yerrakalva*** **[2012] IRLR** at paragraph 41 was mentioned and the need to consider *'the whole picture of what happened in the case and whether there has been unreasonable conduct'.* Reference was also made to ***McPherson v BNP Paribas (London Branch) (No. 1)*** **[2004] ICR 1398** and where at paragraph 40, the Court of

Appeal rejected the requirement for a causal link between the unreasonable conduct in question and the costs being claimed.

25. Mr Roberts for the respondent also referred to ***Yerrakalva*** and ***McPherson*** and also the case of ***Haydar v Pennine Acute NHS Trusts*** **UKEAT/0141/17** and in relation to the application of Rule 76(1)(a) noted the two stage test of determining whether the conduct satisfies the test of being *'unreasonable'*. He also noted that in ***Yerrakalva*** , Mummery LJ clarified that he did not determine in ***McPherson*** that causation as to being costs being incurred by the unreasonable conduct should be disregarded

26. In terms of disruptive conduct, the claimant's representative referred to the case of ***Garnes v London Borough of Lambeth and another*** **UKEAT/1237/97**, which involved a claimant who sought multiple adjournments of an interlocutory hearing was considered to '*frivolous and vexatious'.*

27. In relation to their arguments of unreasonable conduct by the respondent, the claimant's representatives referred to ***Dyer v Secretary of State for Employment*** **UKEAT/183/83** and that 'unreasonableness' should be considered in terms of its ordinary meaning and should be treated as being equivalent to '*vexatious'.*

28. The argument of no reasonable prospects of success was supported by the case of ***Balls v Downham Market High School & College*** **UKEAT/0343/10.**

29. The question of wasted costs included a reference to ***Ridehalgh v Horsefield and another*** **[1994] Ch 205** where a 3 stage test was identified by the Court of Appeal, which interestingly includes consideration as to whether unnecessary costs where incurred by a party when improper, unreasonable or negligent acts by another representative are identified. Unreasonable conduct was described in this judgment as being conduct designed to harass the other side in a vexatious manner rather than progress the case. The case of ***Sykes (in a matter of costs) v Wright and others*** **UKEAT/0270/15**, was relied upon to support the contention that a costs and wasted costs order are distinct and one can be made without the other.

Discussion

30. An award of costs is not something that is routinely imposed in Employment Tribunal proceedings and the discretion afforded to an Employment Judge is subject to the application of Rules 76 and 80, being focused upon behaviour of parties and representatives in the proceedings that falls below the standard that one would reasonably expect in litigation of this nature. Parties are of course subject to the duty under Rule 2 of the

Tribunals Rules of Procedure and are expected to cooperate so as to further the overriding objective and assist the Tribunal in ensuring that cases are dealt with in the interests of justice.

31. This matter involved an application which was made shortly before the final hearing and which was heard on 29 November 2019, less than 2 months before the final hearing took place. It should be noted that the application was actually made on 12 September 2019 and due to the Tribunal's listing capacity, it took more than 2 months for the application to be heard, but the claimant argues that this was motivated by an intention to disrupt the claimant and his representatives in their preparation for the final hearing. It is unfortunate that they were made at this stage, but I note that the respondent had changed its representatives during the late spring/early summer of 2019 and it did not become aware of decisions being made in the claimant's other Tribunal claim against the Chief Constable of Hertfordshire until September 2019. While unfortunate, I do prefer the respondent's submissions that the timing of the application was based upon a consideration of matters arising at the time and new representatives taking into account what final steps they might require to be taken before the final hearing takes place. Representatives often feel a need to ensure that their client's case is afforded maximum protection at hearing and applications such as the one made was in my view done for that very reason. This particularly applies to the application to amend the response to deny that the claimant had done a protected act. The application was not made for mischievous reasons to derail or impair the claimant's preparations. Whether the applications that were made are reasonable or not, will be considered below.

32. The application was no doubt a distraction for the claimant and his representatives, especially as it took place at a time where witness evidence was in the process of being finalised. It dealt with issues that were likely to be resisted by the claimant and the respondent would have been aware that an application of this nature was not one that would be met with acquiescence on the part of the claimant, or with a simple and unconsidered objection.

33. Nonetheless, the respondent had been provided with information relating to the claim brought against Hertfordshire and a decision was reached to include in the application to amend, the additional applications that there be a stay pending the determination of the Hertfordshire case and for a deposit order relating to the complaint of victimisation.

34. I noted that although sceptical of the prospects of the respondent succeeding at hearing with the amendment that it sought, Employment Judge Brown did allow this part of the respondent's application. In this respect, the respondent was not unreasonable in making this application.

35. However, he felt that the application to stay proceeding had little prospect of succeeding due to much earlier stage procedurally the Hertfordshire claim had reached in the Tribunal, that there was no guarantee the

Hertfordshire claim would resolve in a way that would resolve issues in this claim, that the evidence of third party witnesses and third disclosure was not necessary and that it would be disproportionate to impose a stay. His view was that there was simply not a sufficient connection between the two claims. Although the respondent had perhaps understandably wanted to protect their position in relation to the possibility that such a connection may arise, a proper consideration of this particular issue would have indicated to the respondent that this was an application that need not and should not have been made. As a consequence, while I accept that this part of the application was not made unreasonably (Rule 76(1)(a)), it was one which had no reasonable prospects of success in accordance with Rule 76(1)(b).

36. In relation to the third part of the application, Employment Judge Brown did not allow a deposit order to be made against the claimant. He was not satisfied that the claimant's claim had little prospect of succeeding in accordance with Rule 39(1). He did recognise in paragraph (14) of his order that; *'…some apparent force in the respondent's submissions'* and his conclusion in relation to this particular application was that:

'Victimisation complaints are acutely fact-sensitive, and I was not satisfied that I could fall back on inherent plausabilities or implausabilities to decide that the claim had little prospect of succeeding. I should make it clear that it is not a positive conclusion that the claim in fact has more than little prospect of succeeding (and so should not be thought to insulate the claimant from any application for costs), only a conclusion that the respondent did not persuade me today that it did not.'

This does suggest that the decision of Employment Judge Brown was a finely balanced one and one where it could not be said that arose from his consideration of an application that had been made unreasonably in accordance with Rule 76(1)(a) or which had no reasonable prospects of success in accordance with Rule 76(1)(b).

37. In relation to the claimant's successful argument that the application for a stay had no reasonable prospects of success, I do then need to consider whether it is right and proper to make an award for costs. Two thirds of the application after all were not considered to have no reasonable prospects of success and the claimant had to face an application from the respondent for these two other issues even if the application for a stay had not been made. Accordingly, had the respondent decided not to pursue the application for stay, would it have made a difference to the work which the claimant would have been expected to undertake in preparing and hearing the application before Employment Judge Brown?

38. Employment Judge Brown did note in paragraph (15) of his order that the respondent's successful application to amend *'was not the real battleground of today',* but also that the claimant did nonetheless resist that application. The deposit order application was of course strongly

resisted by the respondent, for obvious reasons. This case is being determined in the Employment Tribunals and not the civil jurisdiction and as such my discretion (within the constraints of Rule 76), is a wide one. It is of course somewhat difficult to consider whether these the claimant would have conceded the first and third parts of the application had the second part of the application been brought. It does appear that there was some tension between the parties by late 2019 and while the amendment application was not the main 'battleground', it would probably have only been conceded had the application for the deposit order not been brought.

39. Ultimately, it is fair to say that the claimant has been put unreasonably to some of the costs incurred by the application which was heard by Employment Judge Brown. I note that appendix 1 of the claimant's written submissions indicate costs totalling £5,828.40 including counsel's fees. In determining an appropriate award for costs, I have not sought to reduce the claimant's solicitor's hourly rate, but have reduced the time for preparation, drafting and consideration from 134 units to what I believe is a more appropriate level of 100 units. In terms of correspondence, attendance and counsel's fees, I have not made any reduction. This reduces solicitor's costs to £3,211 plus VAT of £561.93. If I add counsel's fees of £1,000, the total figure for costs is now £4,772.93.

40. In my judgment, the correct order in this case is that the respondent pays the claimant's costs but limited to £1,590.98, being one third of the total costs claimed following my adjustment above. This approach reflects the extent to which the claimant was 'successful' in arguing the reasonableness of the application of the three issues. I do not think that the hearing would have been avoided had the respondent decided not to bring or withdrew the second application to stay and as a consequence, this is not a case where counsel's fees could have been avoided, hence they being treated in the same way as solicitor's costs in terms of apportionment.

41. Finally, for the avoidance of doubt, I do not consider that Rule 80 applies in this case and this is not a matter where a wasted costs order should be made against the respondent. There was nothing before me which suggested that there had been any separate unreasonable or negligent act or omission on the part of the respondent's representative. This was a case where the respondent's relevant employees and their legal representatives appeared to be working closely together and that their representatives were only acting following the provision of advice and taking instructions. There was no suggestion in the order of Employment Judge Brown that the respondent's representatives behaved unreasonably at the hearing and this is a case where consideration as to costs should only be restricted to the application of Rule 76.

Conclusion

42. Accordingly, the decision in this matter is as follows:

(a) the claimant's application for a costs order arising from the respondent's application for a stay which was heard by Employment Judge Brown on 29 November 2019 is successful as it had no reasonable prospects of success in accordance with Rule 76(1)(b) and a cost order is made against the respondent in the sum of £1,590.98;

(b) the respondent's other two applications which were heard by Employment Judge Brown on 29 November 2019 relating to an amendment and a deposit order were reasonably made and are not subject to a cost order.

(c) the claimant's application for a costs order in accordance with Rule 76(1)(a) is unsuccessful and is dismissed; and,

(d) the claimant's application for a wasted costs order in accordance with Rule 80 is unsuccessful and is dismissed.

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Employment Judge Johnson

Date: …25 November 2020……..
26.11.20
Sent to the parties on: .....
Ms J Moossavi
.....
For the Tribunal Office