



EMPLOYMENT TRIBUNALS

The Claimant: Ms E Aghaki
First Respondent: Habib Bank Zurich PLC
Second Respondent: Mr M Mehdi
Third respondents: Mr M Butt

JUDGEMENT AT A PRELIMINARY HEARING

Heard at: Midlands West Employment Tribunal (by CVP)
On: 7 December 2020
Before: Employment Judge Kelly (sitting alone)

Appearances

For the claimant: Mr Lunat, solicitor
For the respondents: Ms Dobbie of counsel

JUDGMENT

It is ordered that:

- (1) The claimant pay to the respondents the sum of £506.00 by way of costs.

REASONS

1. The hearing was to consider the respondents' application for costs in relation to:
 - 1.1 The claimant's application of 6 May 2020 to amend her claim;
 - 1.2 Alleged breaches of orders by and unreasonable conduct of the claimant up to and including 12 Nov 2020.

2. This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was by CVP. A face to face hearing was not held because it was not practicable. The claimant gave evidence and was cross examined. The documents that we were referred to are in a bundle. An interpreter was available for the claimant, although she chose not to make use of his services to any great extent.
3. Under rule 76 of the 2013 Employment Tribunal Rules, a Tribunal may make a costs order and shall consider whether to do so where it considers that a party has acted vexatiously, abusively, disruptively or otherwise unreasonably in the way that the proceedings or part have been conducted. A Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party.
4. Under rule 84, in deciding whether to make an order for costs, and if so in what amount, the Tribunal may have regard to the paying party's ability to pay.

Application for costs relating to claimant's amendment application

5. The respondents agreed various amendments by the claimant of her claim at a preliminary hearing on 15 July 2020, but opposed the claimant's application for amendment of her claim of 6 May 2020.
6. On 6 Nov 2020, the respondents wrote to the claimant:

We have not heard from you in regards to our emails below and, therefore, assume that your client intends to pursue her application to amend her claim to include the further allegations of discrimination/harassment as set out in your application dated 6 May 2020. We are therefore writing to put you on notice of our intention to seek our costs in relation to responding to this application in the event that either of the following circumstances apply: (1) the hearing is postponed or delayed due to your client's conduct; (2) your client's application fails, or (3) the application is permitted but your client is unsuccessful in establishing the 'new' allegations as acts of discrimination/harassment at the final hearing.

7. The respondents contended that the claimant acted unreasonably in respect of her application to amend as follows:
 - 7.1 Failing to include the details in her originating claim such that she felt the need to make an application to amend in the first instance;
 - 7.2 Making and maintaining an application to add various new claims (some of which were long out of time) when she already had a claim form comprising of many claims of the same jurisdiction (but on different facts);
 - 7.3 Making and maintaining an application for some matters which were mere clarification or repetition of pleaded claims;
 - 7.4 Maintaining the application after the comments made by respondents' Counsel at the PH on 15 July 2020; and
 - 7.5 Pursuing the application in the face of respondents' costs warning.

8. The respondents said that, as a result of the claimant's unreasonable conduct, they were required to prepare a bundle for and attend a separate preliminary hearing on 13 Nov 2020, leading to unnecessary costs being incurred.
9. We refer to our Decision of 13 November 2020 in relation to the claimant's application to amend her claim of 6 May 2020.

Application for costs related to alleged breach of orders and other unreasonable conduct

10. On 15 July 2020, the claimant was ordered to: (1) provide a Schedule of Loss (SOL) by 31 July 2020; and (2) reply to respondents' request for further and better particulars (FBPs) by 11 September 2020. The claimant failed to do so.
11. On 5 August 2020, the respondents chased the claimant's solicitor for the SOL.
12. Unknown to the respondents, on 13 Oct 2020, the tribunal wrote to the claimant requiring her to provide reasons for her non compliance with the order by 6 Nov 2020.
13. By 19 October 2020, the respondents had not received a SOL, nor a reply to the email chasing the same. Further, the claimant had failed to provide the replies to the FBPs.
14. On 19 October, the respondents wrote to the Tribunal seeking an Unless Order for the SOL and FBPs and applying for the costs incurred in respect of chasing compliance with Orders and applying for an Unless Order.
15. On the same day, the claimant's representative provided the SOL to the respondents suggesting it had been sent prior, but providing no evidence of this. The reply made no mention of the delayed FBPs and did not attach any.
16. The respondents responded on 21 October 2020 highlighting this default. the claimant did not reply to this.
17. On 3 November 2020, the respondents' solicitors wrote to the claimant's solicitors again chasing the outstanding FBPs. Again, there was no reply to this email.
18. On 6 November 2020, the claimant's solicitors provided the FBPs in an email which stated:

So far as the schedule is concerned, it had been prepared some time ago and we believed it had been served in the first week of August. Having not heard from the respondents we had therefore assumed that it had been received by them. We confirm we did however now serve it on 19 October immediately upon receipt of the respondents' application.

19. It then explained the claimant's delay in providing the FBPs by reference to the claimant's severe mental state, loss of accommodation and the fact that the request caused her 'anxiety and intrusion into her negative experiences'.

20. The claimant did not at any time apply for an extension of time to provide the FBPs or, prior to their provision, tell the respondents that there would be a delay and why.
21. On 9 Nov 2020, respondents requested from the claimant a copy of the covering email attaching the schedule of loss. The claimant responded on 9 Nov 2020, but did not provide it. On 11 Nov 2020, respondents requested it again.
22. The hearing of 13 Nov 2020 was converted to a CVP hearing by the tribunal at short notice. The claimant applied to adjourn the preliminary hearing of 13 Nov 2020 at short notice on 12 Nov 2020 and without medical evidence to substantiate her assertion that she was not fit to participate in the hearing by CVP. The respondents objected to the application.
23. The respondents said they were put to extra time and costs in seeking to progress the matter and ensure compliance.

Claimant's ability to pay

24. We heard oral evidence from the claimant on her ability to pay and we were referred to documents relevant to this. The claimant's written evidence was that her income consisted of £1200.97 per month state benefits and her outgoings were £1439.50 per month.
25. However, her oral evidence and the documents showed that she received substantial sums from a family member which allowed her considerable flexibility in her spending so that: she maintained a health club membership costing £70 per month; she maintained a Netflix subscription; she spent more than £65 in taxis in July 2020 in addition to fuel for her car, saying she did not know how to use buses; she had booked a holiday in Europe for the summer of 2019 and the reason she did not go was problems with her passport, not for financial reasons; she maintains a relatively expensive car, a 2015 Audi A3; she spends money on restaurant meals and in café nero. Further, she has £7000 in an ISA in her name.

Details of application quantum

26. The respondent claimed for the time of a partner at the rate of £425 per hour, and associate at the rate of £220 per hour.
27. In relation to costs incurred by the claimant's failure to comply with a Tribunal order, the respondent claimed £3516.50 plus VAT.
28. In relation to costs incurred by the application to amend, the respondents claimed £9,356.76 in total.
29. The respondents said they would cap their application at the figure of £5000 in total.
30. There was no application for the respondents' costs of attending this hearing. The respondents' costs schedule stated that costs were sought in respect of the PHs of 15 July and 13 Nov 2020.

Conclusion

Application for costs relating to amendment application

31. We do not consider that the claimant acted unreasonably in making an application to amend after failing to include all particulars on which she wished to rely in her claim to the tribunal. Although we did not agree that the medical evidence which she produced proved that the claimant could not include all particulars on which she wished to rely in her claim to the tribunal, this was an arguable point. It is commonplace for claimants to make applications to add further details of to their claims in discrimination claims and it is a matter of discretion for the tribunal whether or not to allow the applications. We exercised our discretion against the claimant, but that does not mean that her application was hopeless.
32. We do not consider that the fact that the respondents warned the claimant they may make a costs application means that costs should automatically be awarded. Although a costs warning may be something to take into account in deciding whether to order the payment of costs, there must be grounds for the costs award.
33. Therefore, we do not consider there are grounds to make an award of costs in relation to the amendment application.

Application for costs related to alleged breach of orders and other unreasonable conduct

34. We do not consider that the claimant's application of 13 November to adjourn the hearing of 13 November 2020 due to be it being converted on short notice to a CVP hearing was unreasonable, given that the conversion of the hearing to CVP was on short notice. We will not make an award of costs in relation this this.
35. The claimant breached the tribunal's order of 15 July 2020, by failing to (1) provide a Schedule of Loss (SOL) by 31 July 2020; and (2) reply to respondents' request for FBPs by 11 September 2020.
36. We note that reason given by the claimant for failing to provide FBPs was her mental state and loss of accommodation. However, the claimant did not take steps to inform the respondents that she was in difficulty over providing the FBPs or this reason or apply to the tribunal for an extension of time to comply with its order, so that it was reasonable for the respondents to chase for their provision.
37. We consider it reasonable for the respondents to have pursued from the claimant the SOL, the FBPs and evidence that she had, as she claimed, in fact sent the SOL, as this would indicate whether there had been compliance with an order or not.
38. We consider that there are therefore grounds for a costs award given the claimant's failure to comply with the tribunal's order or mitigate the impact of this on the respondents by explaining the delay or responding promptly to its correspondence relating to this. We consider that it would be reasonable, in principle, to exercise our discretion to make an award of costs against the claimant in respect of these defaults.

39. This is particularly in light of the fact that that the claimant can afford to make a substantial payment in respect of a costs award given that she has £7000 in savings in an account in her name and regularly spends significant sums on non-essential items such as gym membership and taxis.
40. Tribunal orders are made for a reason which is to prepare efficiently for the hearing of the case. A party does not have discretion whether or not to comply. It is reasonable for the other party to chase up the matter if there is non-compliance. The defaulting party should be aware that this will inevitably put the other party, if it represented, to the expense of additional legal fees.
41. However, we do not consider that the sum claimed by the respondent is proportionate to the work undertaken. We consider the legitimate work undertaken by the respondent's solicitors to be as follows:
- 41.1 Chase claimant for SOL on 5 August while informing client of the same: 3 units
 - 41.2 Application for unless order on 19 October while informing client of the same: 7 units
 - 41.3 Letter of 21 Oct 2020 while informing client of the same: 3 units
 - 41.4 Letter of 3 Nov 2020 chasing F&BPs while informing client of the same: 3 units
 - 41.5 Letter of 9 Nov 2020 while informing client of the same: 2 units
 - 41.6 Claimant's reply of 9 Nov 2020 while informing client of the same: 3 units
 - 41.7 Letter of 9 Nov 2020 while informing client of the same: 2 units
 - 41.8 Total number of units: 23.
42. We consider that an associate should have been perfectly well able to deal with this. We accept that solicitors' rates are in practice higher than government solicitors' guideline hourly rates and that the rate of £220 per hour is reasonable. 2.3×220 is £506.
43. We do not accept that the respondent is entitled to claim for its VAT as it is likely to be able to reclaim it.

44. Accordingly, we order the claimant to pay £506.00 to the respondents in respect of their costs.

Employment Judge Kelly

Signed on: 18 December 2020