



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Miss Mercy Zvenyika

v

(1) NOA Healthcare Limited
(2) Mr W Olakkengil
(3) Mr B Thomas

Heard at: Cambridge

On: 15 January 2021

Before: Employment Judge Finlay

Members: Mr C Davie and Mrs L Gaywood

Appearances

For the Claimant: No appearance

For the Respondents: The second and third respondents in person

JUDGMENT

Upon the respondents' application for an order for costs, the unanimous Judgment of the Tribunal is that the application succeeds and the claimant is ordered to pay to the respondents the sum of £10,000.00.

REASONS

The Hearing

1. This was the postponed hearing of the respondents' application for a costs order against the claimant. The application had been made in time and was supported by a schedule of costs and by copies of correspondence between the respondents' solicitors and the claimant in May 2018 and March 2019.
2. Both the second and third respondent attended today. The claimant was not present. The original listing of this application in early 2020 had been postponed on the application of the claimant on the grounds that she was then suffering from stress. Her application had been supported by a doctor's note and had not been opposed by the respondents. She had

given no reason for her non-attendance today and attempts by the tribunal to contact her by telephone had proved fruitless, despite voicemail messages left. The claimant had previously been notified of her right to submit written representations in response to the application, but had chosen not to do so. Mr Olakkengil reported that he had bumped into the claimant in a supermarket some three months ago, but they had not discussed this hearing and he did not have any up to date information regarding her financial means.

Legal framework

3. The ability of an employment tribunal to make an award of costs is set out in Rules 75 and 76 of the Employment Tribunal Rules of Procedure. In particular, Rule 76 provides that a tribunal may make a costs order, and shall consider whether to do so, where it considers that a party has acted vexatiously or otherwise unreasonably in bring the proceedings or that a claim or response had no reasonable grounds of success. It was on these bases that the respondents made their application.
4. There is therefore a two stage process. The tribunal first considers whether the criteria are made out and if so, whether it is appropriate to make an order for costs.

The claim

5. The claim had been brought by the claimant against the first respondent which is the company that employed her and against the second and third respondents personally. The second and third respondents are senior people within the first respondent.
6. The claim had been heard over four days in April 2019. The claimant brought complaints of race discrimination and constructive unfair dismissal. We unanimously dismissed all her complaints.
7. Whilst it was necessary for us to hear the evidence in order to form our conclusions, we found not an iota of evidence to support the allegations of race discrimination. Even based on her own case, the claimant did not get close to establishing a prima facie case of discrimination. Similarly, she did not get close to proving a fundamental breach of her contract of employment which would be required to found her claim for constructive dismissal. On the contrary, her actions at the time of and following her departure from the first respondent were entirely inconsistent with her allegations, such that in the final paragraph of the reasons for our judgment, we cast doubt on the claimant's credibility and her own belief in the specific complaints she had brought.

Findings

8. For the reasons set out in the preceding paragraph, we consider that the criteria for consideration of an award of costs are fulfilled, both in that the

claimant acted unreasonably in bringing the proceedings and in that the claim had no reasonable chance of success.

9. In going on to consider whether to make an order for costs, we had regard to the following:
 - 9.1 The claimant is a litigant in person. Despite encouragement from the respondents' solicitors, she chose not to seek professional advice. Although she had experience of HR in her role with the first respondent and although she is very well educated and qualified, she was not a qualified HR professional and had no expertise in employment tribunal practice.
 - 9.2 There was evidence that the claimant had failed to comply with case management orders made by the tribunal prior to the final hearing, but we had no criticism of the way in which the claimant conducted herself over the four days of the hearing.
 - 9.3 No deposit order had been made by the tribunal and no application had been made by the respondents for a deposit order. The respondents had made an application to strike out the claim shortly before the final hearing, but this application had been based on a discrete issue relating to alleged failure to comply with case management orders. We had refused the application.
 - 9.4 On the other hand, the respondents' solicitors had written three detailed letters to the claimant warning her of the weakness of her case and warning her that they would be instructed to apply for costs if her claim failed. As early as May 2018, the claimant was advised that the respondents' costs would be likely to be in the region of £20,000. The analysis of the claimant's case in the second of those letters, admittedly only two weeks before the start of the final hearing, closely mirrored our own findings. We have reviewed those letters and although we found them to be forcefully written, we did not consider them to be oppressive.
 - 9.5 The claimant has not engaged with this application. She has neither provided any information in writing, nor has she attended today. She has not had the courtesy to inform the tribunal or the respondents of her non-attendance or the reasons for it.
 - 9.6 Whilst we are very conscious that the purpose of a costs order is to compensate and not to punish, we do note that the claimant brought her claim not only against the company which employed her, but also against two individuals within that company. Those two individuals had unpleasant and unmeritorious allegations of race discrimination hanging over them for more than a year.
 - 9.7 The respondents' schedule of costs amounts to £28,764.03. This was a four day hearing involving allegations of race discrimination and constructive unfair dismissal. We have reviewed the schedule and whilst

the total might be considered high, we do not find it unreasonable so. In any event, the respondents have limited their application to £20,000.

- 9.8 We have no current information as to the claimant's means. What we do know is that she is a highly educated professional in her mid-40s. Whilst she was suffering from ill health at the beginning of 2020, we have no reason to believe that there is any medical issue limiting her earning capacity.
10. Weighing all these factors, we conclude that it is just and appropriate to make an order for costs and it is right to compensate the respondents for part of the costs they incurred in defending this claim. Our conclusion is that the claimant should pay half of the costs claimed, a total of £10,000.

Employment Judge Finlay

Date: 15 January 2021

Sent to the parties on:
02/02/2021

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For the Tribunal Office

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