EMPLOYMENT TRIBUNALS

Claimant: Mr Somunsunthram

Respondent: BP Express Shopping Ltd

REASONS FOR JUDGMENT ON COSTS

These reasons are given following a request for reasons dated 2 December 2020.

Introduction

1. Judgment was given on 5 November 2020 rejecting the application (sent to the parties on 26 November 2020). The application for costs is made on the basis that the respondent contended that the claimant's conduct (and/or the conduct of his representative) leading up to and at the Preliminary Hearing dated 1 October 2020 was disruptive, vexatious and/or unreasonable pursuant to Rule 76(1)(a) of the Tribunals Rules of Procedure.

Key facts

2. The claim form in this case was lodged on 27 December 2019 for unfair dismissal and disability discrimination.

3. Notice of the Preliminary Hearing was issued on 15 March 2020. The Notice stated that the hearing would consider the issue of whether or not the claimant was disabled within the meaning of section 6 of the Equality Act 2010 and to give further case management orders.

4. On 19 May 2020 the claimant's representative submitted the claimant's disability impact statement and medical evidence. This was later than the date ordered by the Tribunal (which for ease of reference was 30 April 2020). The respondent set out its position by way of email from its representative on 11 June 2020.

5. On 11 September 2020, the respondent provided the claimant's representative with a draft agenda for the Preliminary Hearing. The claimant's representative responded by way of letter dated 28 September 2020. They advised that the claimant and his family may require a native speaker of Tamil and Sinhala language Sri Lanka as interpreter for the hearing.

6. The respondent case management agenda dated 29 September 2020, sent to the Tribunal, in the section on any adjustments needed stated

"the Claimant and his family may require a native speaker of Tamil and Sinhala language Sri Lanka as interpreter"

7. The undated case management agenda of the claimant stated the same.

8. There is no record, however, of any formal application made between 15 March 2020 and the Preliminary Hearing from the claimant or his representative such that an interpreter would be required to support the claimant at the Preliminary Hearing.

9. On 29 September 2020, the respondent provided the Tribunal with the draft agenda for the Preliminary Hearing, the claimant's medical documents and the respondent's position on the issue of disability.

10. At the request of the Tribunal on 30 September 2020, the respondent provided the claimant's representative with a draft bundle for the Preliminary Hearing on 30 September 2020. The respondent followed up the claimant's representative asking for their comments, but failed to hear from them. The bundle therefore had to be sent to the Tribunal without their input.

11. On 30 September 2020, the Tribunal converted the in-person Preliminary Hearing into a CVP hearing and provided CVP joining instructions. The notice stated that if an interpreter or other support was required for the hearing, this was to be notified to the Tribunal immediately. No such request was apparently made by the claimant or his representative (but this notice of course was issued very late-on the day before the hearing).

12. At 9.50am on 1 October 2020, Counsel for the respondent signed on to the CVP for the Preliminary Hearing. However, it was not possible to contact the claimant. By 10.17am there was still no ability to connect with the claimant. At about the same time, a message was sent to the tribunal that the claimant was having difficulty accessing the CVP.

13. At 10.43am the Employment Tribunal made contact with the claimant's rep by telephone. The claimant's representative said they were having difficulties and wished to postpone the CVP hearing.

14. The Employment Tribunal decided that as CVP was not working there would be a telephone hearing to deal with the claimant's application to postpone the CVP hearing.

15. The telephone preliminary hearing commenced at 11.08am. The claimant's representative stated they were having difficulties with their connection. They stated that the claimant was suffering from ill health and this had hampered their preparation. The claimant did not have home internet access. They were trying to use their office to try and host a meeting but were still having IT/wi-fi difficulties. They were unable to access the CVP system. They also stated that the claimant needed a Tamil interpreter to have a fair preliminary hearing. They applied to postpone the hearing. In considering all the circumstances, the respondent did not oppose the application but reserved their position on costs. The hearing was postponed and relisted.

16. On 15 October 2020 the respondent made written submissions seeking an order for costs.

17. The Employment Tribunal, having carefully considered the application, considered it would not be necessary to hear further from the claimant in all the circumstances and made the decision to reject the application for costs in a judgement dated 5 November 2020 (sent to the parties on 26 November 2020).

18. The respondent sought reasons for the decision in a letter dated 2 December 2020.

Submissions by respondent

19. It is helpful to summarise the gist of the submissions of the respondent.

20. The respondent submitted that the claimant had instructed a representative to act on his behalf at the Preliminary Hearing, whom did not require an interpreter, and the Tribunal had made steps to arrange a telephone conference where disability status could be discussed.

21. Further, that the claimant and his representative had been aware of the Preliminary Hearing since 15 March 2020 and had had sufficient time to request an interpreter in good time beforehand, if needed.

22. In addition, that the claimant and his representative had also been aware of the Respondent's position on disability since 11 June 2020 and so should have been prepared to discuss this at the Preliminary Hearing.

23. The respondent recognised that awarding costs is the exception rather than the rule, as per Mummery LJ, in **Barnsley MBC v Yerrakalva [2011] EWCA Civ 1255**. The respondent submitted that this was a case which justifies a costs order given the facts set out above. The costs that the respondent applied for the claimant to be ordered to pay totalled £1,024.20 plus VAT (which includes Counsel's fees for the Preliminary Hearing, plus the costs of this Application).

24. The respondent submitted that it would be appropriate for an order to be made for payment of the entirety of the costs it had reasonably incurred in respect of attendance at the Preliminary Hearing.

25. The respondent stated that the costs claimed fell within the definition of costs set out in Rule 74(1) of the Tribunals Rules of Procedure and pursuant to Rule 78(1)(a) of the Tribunals Rules of Procedure are less than the level at which a detailed assessment would be required. Further, although there is no requirement for the Respondent to demonstrate a causal link between the claimant's unreasonable conduct and the specific costs it has incurred, the Tribunal must look at the situation as a whole (per **Yerrakalva**).

26. The effect of the claimant's conduct has been to inflate the respondent's costs it was said.

27. The respondent says it incurred costs of Counsel for the full three hour Preliminary Hearing and would incur further costs of another three hour preliminary hearing (at least) to consider the same listed issues.

28. The respondent submitted that grounds exist which required the Tribunal to consider an award for costs in these circumstances.

29. The machinery of Rule 76 of the Tribunals Rules of Procedure exists to address situations such as this, the respondent suggested. The Respondent stated that in this instance the Tribunal should exercise its discretion in favour of making an order for costs against the claimant and that the order should be to compensate the respondent for the costs it has incurred as set out above.

30. The respondent was only claiming for costs it believes had been unreasonably incurred due to the claimant's failures identified above. It was not seeking to claim for costs in connection with the preparation of its own case or reasonable work incurred in connection with its preparations for the Preliminary Hearing.

Relevant Legal provisions

When a costs or preparation time order may be made

31. A tribunal **may** make a costs or preparation time order, and **must** consider whether to do so, where it finds that:

    31.1 A party, or their representative, has acted vexatiously, abusively, disruptively, or otherwise unreasonably in the bringing or conducting of the proceedings, or a part of them.

    31.2 Any claim made in the proceedings by a party had no reasonable prospect of success (*Rule 76(1)(a)-(b)*.) of the Employment Tribunal Rules of Procedure.

32. A tribunal may also make a costs or preparation time order where either of the following applies:

    32.1 A party has been in breach of any order or practice direction;

    32.2 A hearing has been postponed or adjourned on the application of a party.

(*Rule 76(2)*.)

33. The extent to which a party has had access to legal advice might also be taken into account by a tribunal when considering whether to make a costs order.

The tribunal has a wide discretion

34. Where the case falls into a category in which costs may be awarded, case law has emphasised that the tribunal has a wide and unfettered discretion and the EAT will not use “legal microscopes and forensic toothpicks” to “tinker” with it (**Barnsley Metropolitan Borough Council v Yerrakalva [2012] IRLR 78)**.

35. Given this wide discretion, an appeal against a costs order (or a refusal to make a costs order) will only succeed if it establishes that the tribunal erred in law in making its decision or if it was not based on relevant circumstances.

36. In **Schaathun v Executive and Business Aviation Support Ltd UKEAT/0615/11,** the EAT set aside a costs order made by an employment judge where the claimant had made a request for an interpreter "if possible", less than a week before the hearing. The tribunal was unable to arrange for an interpreter and, on its own volition, postponed the hearing. The EAT held that it was perverse for the tribunal to conclude that the claimant's conduct was unreasonable in such circumstances.

37. In **Haydar v Pennine Acute NHS Trust UKEAT/0141/17** the EAT held that an employment tribunal had wrongly placed the burden on the claimant to establish why costs should not be awarded under rule 76. Since the costs application was made by the respondent, it was for the respondent to satisfy the tribunal that it had jurisdiction to make a costs award. If it did have that jurisdiction, it was then for the tribunal to satisfy itself that it was right and proper to exercise the discretion to award costs, having regard to all the relevant factors. As that had not been the approach adopted here, the case was remitted.

Manner in which the proceedings are conducted

38. The tribunal must not move straight from a finding that conduct was vexatious, abusive, disruptive or unreasonable to the making of a costs order, without first considering whether it should exercise its discretion to do so.

39. It is not necessary for the tribunal to formally set out both stages of this consideration in its judgment, but it must be apparent that it has appreciated that there are two stages and that it has turned its mind to both when awarding costs (**Ayoola v St Christopher's Fellowship UKEAT 0508/13)**.

Unreasonable conduct

40. Whether conduct is unreasonable is a matter of fact for the tribunal.

41. Unreasonableness has its ordinary meaning and should not be taken by tribunals to be the equivalent of vexatious (**Dyer v Secretary of State for Employment UKEAT/183/83**).

42. Conclusions

The burden of proof falls on the respondent to identify unreasonable conduct. I considered that the respondent had not discharged the burden of proof to identify unreasonable conduct by the claimant. I did so for the following reasons.

42.1 First, it was clear that the claimant had identified in the letter dated 28 September 2020 and the case management agenda that he needed a Tamil interpreter. The hearing was converted into a CVP hearing by notice

to the parties, after that agenda was sent. The tribunal and respondent were therefore on notice of the need for an interpreter, before the CVP hearing was listed and although it could be said that the claimant should have reminded the Tribunal of this need, in terms, it does not follow that it was unreasonable not to do so. The parties are required to be placed on an equal footing. Where one party had special needs that needed to be accommodated to enable a fair hearing, it would generally speaking not be likely to be unreasonable conduct to seek the application of those needs, especially having put the Tribunal on some notice of this. In other words, where there are "neutral" reasons why a postponement might be needed through no or little fault on the part of the party with special needs. Otherwise, a person with special needs would be much more likely to face costs penalties than a party without any special needs.

42.2 I note the decision in **Schaathun v Executive and Business Aviation Support Ltd UKEAT/0615/11,** where the EAT set aside a costs order made by an employment judge where the claimant had made a request for an interpreter "if possible", less than a week before the hearing. In this case, the claimant had put on notice this need, before the listing of the CVP case and that, albeit they had not repeated the need on receipt of that notice. Further, the notice of listing of a CVP was only sent out one day before the hearing in this case (although a hearing had been listed for some time of course).

42.3 Whilst the tribunal was plainly unable to arrange for an interpreter and postponed the hearing here, I am mindful that the tribunal had some notice of the need **before** it listed the CVP hearing. The fact an interpreter was needed was not picked up by the tribunal. Further, there were other reasons for the postponement in any event.

42.4 Since the EAT held that it was perverse in the **Schaathun** case for the tribunal to conclude that the claimant's conduct was unreasonable in such circumstances, I do not see this case as being sufficiently different. The need for an interpreter gave strong grounds for a postponement without indicating any unreasonable conduct. And, in any event, there were other good grounds for a postponement anyway.

42.5 Secondly, I accept the claimant's submissions made at the hearing that they were having genuine IT difficulties. This was self-evident. There was no evidence that the claimant had wifi at home (or on a personal device) to enable adequate access to the hearing by CVP. The claimant's presence was required to give evidence. Moreover, it appeared to be the unfortunate fact that the claimant's representative had difficulties in accessing CVP too, whether due to the wi-fi connection at their end, or indeed using the CVP system generally. A number of users have had difficulties in using CVP and this is not necessarily any evidence of unreasonable conduct.

42.6 There is also a further issue of ensuring equal footing here under the overriding objective. A tribunal should, in my view, be slow to find the burden on the party seeking costs to prove unreasonable conduct, is established, due to a problem materially connected with whether the other party has less effective IT coverage. Otherwise, a party with less resources

might be placed at a systematic and fundamental disadvantage. There was no evidence that these IT difficulties were inaccurate or contrived. This was a strong further fact pointing against a finding of unreasonable conduct. Indeed, the basic reality is that a significant number of persons have had some difficulties with CVP access, indicating that the IT system is not necessarily perfect.

42.7 Thirdly, the claimant had health difficulties which must have affected his ability to interact with his advisers. He was said to be "shielding" during the pandemic. I also note his disability impact statement. The claimant's ill heath was a relevant (and further) factor militating against a finding of unreasonable conduct.

42.8 Fourthly, there was no application for costs made against the claimant's representative. Whilst it is not being suggested that such a claim would have been well founded, I needed in this application to focus on the claimant's actions. In so far as the claimant's representatives may have been underprepared, or should have sought to check their IT connection, or could or should have notified all parties of the interpreter issue, earlier, it is not apparent that the claimant had any responsibility for any such issues and we were not asked to make an order against the claimant's representative.

42.9 In all the circumstances, I do not find the respondent has discharged the burden of proof as to unreasonable conduct on the part of the claimant. Indeed, I do not consider they came close on these particular facts.

42.10 In so far as there was any unreasonable conduct, (which I do not find to be proved to be the case) in my conclusion it would have been necessary to exercise discretion not to award costs, having regard to all the relevant facts in this case. Amongst other things, the ability of all parties to have access to justice, and to be placed on an equal footing, so far as possible/appropriate, is a fundamental aspect of the court system. The ability to communicate and understand the proceedings is a fundamental part of the service and to have an interpreter was a key need in this case. In addition, there were resource and IT factors of relevant here, as well as ill health.

42.11 The costs application was not well founded and was dismissed for the above reasons.

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Employment Judge Daniels

21 January 2021

Sent to the parties on: 09/02/2021

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For the Tribunal: J Moossavi