



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Ms Mapule Mdlalose

v

Norfolk County Council

Heard at: Norwich

On: 19 April 2021

Before: Employment Judge Postle

Appearances

For the Claimant: Mr Toms, Counsel

For the Respondent: Mr Brett, Solicitor

RESPONDENT'S APPLICATION for COSTS JUDGMENT

The Claimant is Ordered to make a contribution to the Respondent's costs assessed at £5,000.

REASONS

1. Rule 76 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, provides that a Costs or Time Preparation Order may be made and a Tribunal shall consider whether to do so where it considers that:
 - a. a party, or that party's Representative, has acted vexatiously, evasively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way the proceedings (or part) have been conducted; or
 - b. any claim or response had no reasonable prospect of success.
2. The procedure for making a Costs Application is set out at Rule 77. As to the amount of costs that we may order, or should be paid, Rule 78 provides that we may:
 - a. order that the paying party pay the receiving party a specified amount not exceeding £20,000 in respect of the costs of the receiving party; or

- b. order that the paying party pay the receiving party the whole or a specified part of costs of the receiving party with the amount to be paid being determined in England and Wales by way of a detailed assessment carried out either by a County Court in accordance with the Civil Procedural Rules 1998, or by an Employment Judge applying the same principles.
3. Rule 84 provides that we may have regard to the paying party's ability to pay, it is put as follows:
 84. In deciding whether to make costs preparation time or wasted costs order and if so, what amount, the Tribunal may have regard to a paying party's ability to pay.
4. It is well stated law that it is nevertheless a very important feature of the Employment Jurisdiction that it is designed, we accept, to be accessible to ordinary people without the need of lawyers and that in sharp distinction from ordinary litigation in the United Kingdom, losing does not ordinarily mean paying the other side's costs.
5. There is a structured approach in dealing with a Costs Application. It is a three stage exercise and I will summarise that as follows:
 - 5.1 Has the putative paying party behaved in the manner prescribed by the Rules?
 - 5.2 If so, it must then exercise its best discretion as to whether or not it is appropriate to make a Costs Order; and
 - 5.3 If it decides that a Costs Order should be made, it must decide what amount should be paid and whether that matter should be referred for an assessment.
6. In relation to the sub-paragraph (b) of the Rules on costs; *no reasonable prospects*, the test for whether the case brought or the response had no reasonable prospect of success is an objective one. It matters not that the Claimant's may genuinely believe themselves victim of wrong doing contrary to the law, or that they were acting on legal advice.
7. In this case, it is clear when one looks at the substance of the Claimant's allegations, that those allegations were without foundation. They are all about falling below required standards of a Social Worker. Many, if not most, involve major safe guarding concerns and it would be, as Mr Brett says, remarkable if the Respondents took no action. There were some extremely serious matters of lack of performance by the Claimant. Indeed, one involved a sexual assault on a three year old who was in foster care and the Claimant simply did not seem to understand that delaying dealing with the matter was a serious shortfall.
8. It is further noted that even her own Trade Union Representative acknowledged the fact that her probation was a wise thing to extend and that there should be a structured framework which would help this Social

Worker who clearly was falling below the standards required of a newly qualified Social Worker.

9. It is quite clear that had other Social Workers, new or experienced, had a whole host of matters relating to lack of performance and short comings in the very short time span the Claimant had, they would have been dealt with. The Claimant knew this, she knew that she was an under performing Social Worker. Therefore, by any objective assessment, the Claimant must have known that the claim would not succeed. It was doomed to fail from the outset. It had no reasonable prospect of success.
10. For that reason the Tribunal have exercised its discretion to make a Costs Order. As to the amount, the Tribunal has a discretion not an obligation to take into account means to pay and the Tribunal, if we decide not to take into account the paying party's means, we should explain why. If we decide that we will do so, we should set out in our findings about the ability to pay and what impact that has to award costs.
11. This is a case where, for reasons best known to instructing Solicitors, there is no statement before the Tribunal regarding the Claimant's means. What we do have knowledge of is that when the Claimant filed her Schedule of Loss for the Liability Hearing, at page 38 of the Bundle, she confirmed she had found alternative employment from 7 January 2019 and that employment was at a greater sum. Therefore, in salary terms, the Claimant does have some means. We have no other information before us.
12. Having regard to the amount claimed and the relevant points put forward by Mr Brett in connection with at what point the Claimant, if she was in any doubt would have been absolutely aware, that her claim must fail, would have been at the disclosure stage at the very latest.
13. Therefore, the Tribunal believe that having reached the threshold and exercised its discretion, having regard to the Claimant's means, take the view the Claimant should pay a contribution towards the Respondent's costs in the sum of £5,000 and as Mr Brett has said, it is not vatable, therefore it is simply £5,000.

Employment Judge Postle

Date:8/6/21.....

Sent to the parties on:

.....
For the Tribunal Office