



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr J O'Neill

**Respondent:** AW Champion Limited

## JUDGMENT OF THE EMPLOYMENT TRIBUNAL

**Heard at:** London South (by video conference)

**On:** 28 October 2020

**Before:** Employment Judge Kelly (sitting alone)

### **Appearances**

For the claimant: Mr Brown, a solicitor

For the respondent: Miss Barney of counsel

## JUDGMENT

### **The Judgment of the Tribunal is that:**

1. The claimant is ordered to pay the respondent, by way of costs, the sum of £623.00.

## REASONS

- (1) The respondent made an application for costs of today's wasted hearing on the basis of the claimant's unreasonable conduct which led to today's hearing being adjourned. On the day before today's hearing, the claimant changed the basis of his argument that he had a disability at the material time through serving a skeleton argument on the claimant setting out a new basis of his case. In summary this changed the start date of his medical condition from late 2018, as stated in his impact statement, to 2013. This was particularly relevant to the issues as one ground on which the respondent did not concede disability was that it said that the condition relied on was not long term. Therefore, the respondent applied to adjourn the hearing so that the claimant could clearly

explain his evidence through a new statement and to give the respondent time to consider the new statement and, if it felt it required, serve its own evidence. We granted this application.

- (2) The service yesterday by the claimant of his skeleton argument was in breach of the order of 29 June 2020 which required the skeleton argument to be served 7 days prior to the hearing. If it had been served in time, the respondent could have applied to adjourn the hearing which would have saved some of the respondent's costs of today's hearing.
- (3) The claimant was given opportunity to consult with his representative after it became clear that his decision to change his case as above would result in an adjournment to the hearing and a costs application. The claimant decided to proceed with the change.
- (4) Under rule 76 of the Employment Tribunal Rules, a Tribunal may make a costs order 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.
- (5) We consider that the claimant acted unreasonably in changing the basis of his argument as to his disability through serving a skeleton argument on the claimant with this new case, as explained above, on the day before today's hearing, leading to an adjournment of today's hearing.
- (6) The respondent claimed the following costs:
  - (i) £468 plus VAT solicitor's fees, composed of 2 hours and 24 minutes of the time of a solicitor at the hourly rate of £150, and 1 hour 12 minutes of the time of a para legal at the hourly rate of £90. This time was spent in correspondence, instructions to counsel and review of the skeleton argument.
  - (ii) £1400 plus VAT counsel's fees. Counsel was of 1999 call and charged at an hourly rate of £175. She said the time reflected the time taken to draft the skeleton argument, and prepare for the hearing and attend, which time was longer because of the change in the basis of the claim and the need to prepare cross examination of both bases. The respondent considered that the choice of a senior barrister was justified by the fact that this was essentially a disability discrimination claim and the hearing was to deal with that issue.
- (7) The claimant complained that he had not had a breakdown of the activities which made up the hours claimed for. He did not dispute the hourly rates. He suggested that the respondent could make use of part of counsel's preparation claimed for at the adjourned hearing, that being the preparation of cross examination for the claimant's new case.
- (8) The respondent said that the hours claimed were clearly reasonable and that it would have to prepare cross examination again once the claimant's new statement had been received so that it could not make use of the work already done on this. We accept the respondent's two arguments on these points.

- (9) 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.
- (10) We had evidence from the claimant that he is currently unemployed and in receipt of benefits at the rate of £78 per week. He has no savings and does not own a house. He has a car which he says is worth about £300. He has no other assets.
- (11) Notwithstanding the claimant's poor ability to pay, we consider it appropriate to make an order for costs against him given the great unreasonableness of the conduct of the claimant in changing his case from that set out in his impact statement at a late stage in the proceedings, and leaving notifying this change to the respondent until the day before this hearing.
- (12) We consider that the costs claimed by the respondent are moderate and reasonable with moderate hourly rates from the fee earners involved and moderate time taken in preparing for and attending at the hearing. If it were not for taking into account the claimant's ability to pay, we would order the full costs claimed to be paid.
- (13) The respondent made the point that the claimant may get a job in the future but did not put this point to the claimant. We take into account that the claimant is in receipt of state benefits of only £78 per week and has no significant assets.
- (14) Accordingly, we order the claimant to pay to the respondent costs in the sum of £623.00 which is one third of the costs net VAT claimed by the respondent.

**Employment Judge Kelly**

Signed on: 29 Oct 2020