EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT	**V**	**RESPONDENT**
Mr M Caulker		**The Commissioner of the Metropolis**

Heard at: London South Employment Tribunal **On:** In chambers on 6 August 2021

Before: Employment Judge Hyams-Parish
Members: Mr P Adkins and Ms J Jerram

JUDGMENT ON COSTS APPLICATION

The Claimant is ordered to pay a contribution to the Respondent's costs in the sum of £2,500.

REASONS

Background

1. This case was heard by the Tribunal over a period of eight days commencing on 2 March 2020. A decision, together with oral reasons, was given on the final day of the hearing. The outcome was that the Claimant was unsuccessful in all of his claims, those claims being race discrimination, racial harassment and whistleblowing detriment.

2. At the conclusion of the hearing, the Respondent made an application for their costs, but as the Tribunal felt that the Claimant needed time to consider the application, the Tribunal invited the Respondent to make its application in writing and said that it would be considered in the normal way.

3. That application was duly made by the Respondent by letter dated 24 March 2020. Unfortunately for reasons not entirely clear to this Tribunal, the letter was not seen, and actioned, until a year later in March 2021. The Tribunal apologises to the parties for this delay.

Application

4. The Respondent makes its application pursuant to 76(1)(b) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the ET Rules"), namely that the claim had no reasonable prospects of success. Importantly, the Respondent seeks to limit its claim of costs to £2,500.00, despite its actual costs being in excess of £50,000.00.

5. The Claimant gave a very short reply to the application in writing, simply stating that he should not be liable, whilst also informing the Tribunal that he had lost his job. He gave no other information related to his means and ability to pay.

6. Knowing that this matter was to be considered today, the Tribunal again wrote to the Claimant on 18 June 2021 asking for a current statement of his current income and outgoings so that a decision could be made on the costs application. The Claimant replied on 25 June 2021, informing the Tribunal that he had secured a new job, but failing to provide any other details about his means.

Law

7. The Employment Tribunal's powers to make an award of costs is set out in the ET Rules. Any application for costs must be made pursuant to those rules.

8. The relevant rules are set out below:

> ***74(1) "Costs" means fees, charges, disbursements, or expenses incurred by or on behalf of the receiving party (including expenses that witnesses incur for the purposes of or in connection with attendance at a tribunal hearing).***
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> ***76(1) A tribunal may make a costs order or a preparation time order and shall consider whether to do so where it considers that –***
>
> ***(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively, or otherwise unreasonably in either the***

bringing of the proceedings (or part) or the way that the proceedings (or part) had been conducted; or

(b) any claim or response had no reasonable prospect of success.

(c) a hearing has been postponed or adjourned on the application of a party made less than 7 days before the date on which the relevant hearing begins.

(2) 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.

77 A party may apply for a costs order or a preparation time order at any stage up to 28 days after the date on which the judgment finally determining the proceedings in respect of that party, was sent to the parties. No such order may be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the tribunal may order) in response to the application.

78(1) A costs order may –

(a) order the paying party to pay the receiving party a specified amount not exceeding £20,000 in respect of the costs of the receiving party.

(b) order the paying party to pay the receiving party the whole or a specified part of the costs of the receiving party, with the amount to be paid being determined, in England and Wales, by way of detailed assessment carried out either by a county court in accordance with the Civil Procedure Rules 1998, or by an Employment Judge applying the same principles; or, in Scotland, by way of taxation carried out either by the auditor of court in accordance with the Act of Sederunt (Fees of Solicitors in the Sheriff Court)(Amendment and Further Provisions) 1993, or by an Employment Judge applying the same principles;

(c) order the paying party to pay the receiving party a specified amount as reimbursement of all or part of a Tribunal fee paid by the receiving party;

(d) order the paying party to pay another party or a witness, as appropriate, a specified amount in respect of necessary and reasonably incurred expenses (of the kind described in rule 75(1)(c)); or

(e) if the paying party and the receiving party agree as to the amount payable, be made in that amount.

84 In deciding whether to make a costs, preparation time or wasted costs order and, if so, in what amount, the Tribunal may have regard to the paying party's ability to pay.

9. As the Court of Appeal reiterated in ***Yerrakalva v Barnsley Metropolitan Borough Council 2012 ICR 420, CA*** costs in the employment tribunal are still the exception rather than the rule. It commented that the tribunal's

power to order costs is more sparingly exercised and is more circumscribed than that of the ordinary courts, where the general rule is that costs follow the event, and the unsuccessful litigant normally has to foot the legal bill for the litigation. In most cases, the employment tribunal does not make any order for costs. If it does, it must act within rules that expressly confine the tribunal's power to specified circumstances, notably unreasonableness in the bringing, or conduct, of the proceedings. The tribunal manages, hears, and decides the case and is normally the best judge of how to exercise its discretion.

10. A litigant in person should not be judged by the same standards as a professional representatives, as lay people may lack the objectivity of law and practice brought to bear by a professional adviser and this is a relevant factor that should be considered by the Tribunal.

11. A tribunal is not obliged by rule 84 to have regard to ability to pay — it is merely permitted to do so. However, if a tribunal decides not to take into account a party's ability to pay, after having been asked to do so, it should say why. If it does decide to take into account ability to pay, it should set out its findings on the matter, say what impact these have had on its decision whether to award costs or on the amount of costs, and explain why. While lengthy reasons are not required, a succinct statement of how the tribunal has dealt with the matter and why it has done so is generally essential

12. The means of a paying party in any costs award may be considered twice – first in considering whether to make an award of costs, and secondly if an award is to be made, in deciding how much should be awarded. If means are to be taken into account, the Tribunal should set out its findings about ability to pay and say what impact this has had on the decision whether to award costs or an amount of costs.

13. There is no requirement that the costs awarded must be found to have been caused by or attributable to any unreasonable conduct found, although causation is not irrelevant. What is required is for the tribunal to look at the whole picture of what happened in the case and to identify the conduct; what was unreasonable about the conduct and its gravity and what effects that unreasonable conduct had on the proceedings: ***Yerraklava v Barnsley MBC [2012] IRLR 78***.

Conclusions and decision

14. There are three stages to this process. A tribunal must first conclude whether there are grounds for making a costs order. Then it must decide whether to exercise a discretion in favour of awarding costs. Finally, it must decide how much costs to award.

15. Whilst there is an obligation to consider making a costs award if any of the grounds are made out at Rule 76(1) of the ET Rules, there is no obligation to then go on to make a costs award.

16. The Tribunal remembered this case relatively well despite it being some time since the case concluded. It concluded that both grounds 76(1)(a) and (b) of the ET Rules had been met.

17. The Tribunal concluded that the race discrimination claims had no reasonable prospects of success. During the hearing, the Claimant provided no evidence of appropriate comparators and was unable to explain any reason why the Respondent's actions were on the grounds of race. He was unable to prove less favourable treatment or the “something more” than less favourable treatment that was required for the claims to even get off the ground. Similarly the Claimant was unable to say or point to any evidence how the Respondent's conduct, even if unwanted, related to race, which was a requirement of the harassment claims.

18. The Tribunal concluded that the weaknesses relating to other claims became clearer during the hearing, and therefore the Tribunal could not conclude from the claim that they had no reasonable prospects.

19. The Tribunal also concluded that the Claimant had not sufficiently engaged in the process or cooperated with the Respondent in the period leading up to the hearing. In particular, the Claimant did not respond at all to a letter sent to the Claimant inviting him to withdraw his claims, setting out the reasons why. The Tribunal considered this unacceptable and unreasonable. It was an opportunity for the Claimant to review the merits of his claims and to potentially save the Respondent the expense of preparing to defend claims which the Claimant eventually lost. It is also notable that during questioning the Claimant withdrew three specific allegations, it being clear to him that they had no merit. The Tribunal concluded that the Claimant failed to review his case at important stages, when the evidence produced by the Respondent ought to have given him cause to step back and look again at some claims. Had he done so, he might have decided to withdraw certain claims at an earlier stage, thereby saving the Respondent from incurring the expense of defending them.

20. The Tribunal took into account that the Claimant was a litigant in person but also noted that as a police officer, he was more aware of the need for evidence to prove his case, even the burden and standard of proof, than many other litigants in person.

21. Having decided that there were grounds for making an award of costs, the Tribunal concluded that it was appropriate in this case to make such an award.

22. The Claimant did not invite the Tribunal to take into account his means, and gave little information about this, save that the Tribunal noted that the Claimant had secured another job. The Tribunal took into account such information about the Claimant's ability to pay as it was able to, given the limited information presented to the Tribunal by the Claimant. In any event, the amount being claimed by the Respondent assisted the Tribunal with its task.

23. The Tribunal considered the sum of £2,500 to be very reasonable; in fact, the Tribunal noted that the Respondent had been very fair and had they asked for more, the Tribunal might well have ordered the Claimant to pay more. The Tribunal concluded that the amount was affordable to someone, like the Claimant, who was employed.

24. For the above reasons, the Tribunal made an order for the sum claimed.

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Employment Judge Hyams-Parish
6 August 2021