



EMPLOYMENT TRIBUNALS

Claimant: Mr A Afsar

Respondent: Emerald Publishing Ltd

Heard at: Leeds by video link

On: 16 August 2021

Before: Employment Judge Shepherd

Members: Mr M Brewer

Ms Y Fisher

JUDGMENT ON APPLICATION FOR COSTS

The respondent's application for costs against the claimant is refused.

REASONS

1. The judgment of the Tribunal in respect of the claims brought by the claimant was sent to the parties on 26 April 2021. The unanimous judgment of the Tribunal was that the claims of discrimination by reason of the protected characteristic of race and religion or belief against the first respondent were not well-founded and were dismissed.
2. The respondent has made an application for costs pursuant to rule 76(1) (a) of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013. It is contended that the claimant acted unreasonably in the way the proceedings (or part) were conducted, which had resulted in delays to the final hearing and ultimately led to part of the hearing being conducted using written submissions only with 6 of the respondent's 10 witnesses prepared to give evidence but the claimant claiming he was unable to cross-examine them.
3. It was requested that the application for costs was determined on the basis of written representations only and the Tribunal has dealt with the application that basis.
4. The claimant contacted the Tribunal on the fifth day of the hearing indicating that he was not going to attend the hearing because of his anxiety and poor health. He was asked to put this in writing. He provided what he referred to as a statement. In that statement he indicated that there was no way of carrying out any further cross examinations due to his mental health. He asked if he could

submit a written submission or whether this would be the end of the case.

5. The respondent made an application to strike the claim out for failure to actively pursue it or, in the alternative, that there was no case to answer. The application was provided in writing and sent to the claimant who was asked to provide a written response. The claimant did not provide a written response and when telephoned by the Tribunal clerk he indicated that he wanted the hearing to go ahead and that he would provide written submissions. He was told that this would be considered at the reconvened hearing but he did not attend the video link. The Tribunal considered the position. The application to strike out was refused and the signed written statements from the remaining respondent witnesses were taken as read and unchallenged.

6. It was then indicated to the parties that they were to provide written submissions which they did.

7. The respondent's application for costs is on the ground that the claimant acted unreasonably in the way the proceedings (or part) were conducted which had resulted in delays to the final hearing and had ultimately led to part of the hearing being conducted using written submissions only with 6 of the respondent's 10 witnesses prepared to give evidence but the claimant claiming he was unable to cross-examine them.

8. The application referred to the claimant having failed on several occasions to actively pursue his claim and that the April hearing had been the third attempt at having the final hearing.

9. The respondent indicated that whilst it had to accept what the claimant said about his heart condition, there was no evidence of the detrimental impact these proceedings had had on him.

10. The respondent referred to the claimant's ill-health in November 2020 when he had indicated to the Tribunal on the first day that he had developed Covid symptoms over the weekend after having come into contact with a friend/colleague in the supermarket who subsequently told him she had developed the virus. That hearing had been adjourned to day 5 of day 7 to see if any progress could be made. No progress was ultimately made and it later transpired that the claimant tested negative for Covid.

11. There was reference to the third day of the April hearing in which the claimant had an issue with his electricity supply which meant that a witness, who no longer worked for the respondent had to take an additional day of annual leave. The respondent indicated it was circumspect about the reasons given by the claimant as to why he could not continue with the April hearing and the respondent invited the Tribunal to find that the claimant acted unreasonably. It was indicated that the history of the case showed that it had been beset by problems experienced by the claimant on each occasion and this had put the respondent to great cost and anxiety which it was said was due to the claimant unreasonable behaviour.

12. The claimant provided a response to the respondent's application for costs in

which he indicated that he had fought to the end and provided closing written statements and was very disappointed with the outcome. He said that medical evidence had been provided when the case was rescheduled. The day his electricity was off had been unfortunate but he still managed to get through two witnesses. He said that he suffered mentally at the end of the trial but had pushed through with the closing written statement.

Relevant law

13. The Employment Tribunal is a completely different jurisdiction to the County Court or High Court, where the normal principle is that “costs follow the event”, or in other words the loser pays the winner’s costs. The Employment Tribunal is a creature of statute, whose procedure is governed by the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. Any application for costs must be made pursuant to those rules. The relevant rules in respect of the respondent’s application are rules 74(1), 76(1) and (2), 77, 78(1)(a), 82 and 84. They state:-

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).

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.

(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.

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.

14. The discretion afforded to an Employment Tribunal to make an award of costs must be exercised judicially (**Doyle v North West London Hospitals NHS Trust UKEAT/0271/11/RN**). The Employment Tribunal must take into account all of the relevant matters and circumstances. The Employment Tribunal must not treat costs orders as merely ancillary and not requiring the same detailed reasons as more substantive issues. Costs orders may be substantial and can thus create a significant liability for the paying party. Accordingly they warrant appropriately detailed and reasoned consideration and conclusions. Costs are intended to be compensatory and not punitive. The fact that a party is unrepresented is a relevant consideration. The threshold tests may be the same whether a party is represented or not, but the application of those tests should take account of whether a litigant has been professionally represented or not (**Omi v Unison UKEAT/0370/14/LA**). A litigant in person should not be judged by the same standards as a professional representative 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 (**AQ Limited v Holden [2012] IRLR 648**). 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 (**Jilley v Birmingham & Solihull Mental Health NHS Trust UKEAT/0584/06**).
15. 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**). As was said by Mummery LJ in **McPherson v BNB Paribas (London Branch) [2004] ICR 1398**, that there is a balance to be struck between people taking a cold, hard look at a case very close to the time when it is to be litigated and withdrawing, on the one side of the scale, and others, on the other side of the scale, who do what may be described as raising a “speculative action”, keeping it going and hoping that they will get an offer.
16. An apposite extract from the judgment of Sir Hugh Griffiths in **Marler v Robertson [1974] ICR 72** is:

‘Ordinary experience of life frequently teaches us that that which is plain for all to see once the dust of battle has subsided was far from clear to the contestants when they took up arms’.

17. Lord Justice Sedley in the case of **Gee v Shell UK Limited (2002) IRLR 82** stated that it is:

“A very important feature of the employment jurisdiction that it is designed to be accessible to 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”.

18. That remains the case today. Costs are still the exception rather than the rule.

19. The respondent’s application for costs is on the ground of unreasonable conduct of the proceedings. It is not an application on the merits of the claim or that the claimant was pursuing a claim that had no reasonable prospect of success. The first and second hearings had been postponed because of the pandemic and consequent health reasons.

20. The respondent indicates that it was ‘circumspect’ about the reasons given by the claimant as to why he could not continue with the April hearing and the claimant’s explanation was simply not adequate. The respondent questioned whether the claimant ever intended to complete a full hearing.

21. The application is predicated on the respondent’s disbelief of the claimant’s intention to proceed with the hearing.

22. The claimant indicated that he pursued it to the best of his ability but was unable to continue with cross-examination of the respondent’s witnesses due to mental health problems.

23. There is no rule that a party must cross-examine every witness and attend every day of the hearing. The way in which the claimant behaved did not prevent the hearing concluding and the Tribunal reaching a decision on the merits of the case. It was highly unusual but the Tribunal is not satisfied that it had been established that the claimant had acted unreasonably in the way in which he had conducted the proceedings.

24. For the above reasons, the respondent’s application for costs is refused.

Employment Judge Shepherd

18 August 2021.

26 August 2021