



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Mrs K Pilgrim

and

Respondent

Jasmine Care
(Holdings) Limited

Heard at Reading on: 21 October 2021 (in chambers)

Appearances None – dealt with on the
papers

Employment Judge: Vowles
Members: Ms C Baggs
Ms H Edwards

UNANIMOUS DECISION ON APPLICATION FOR COSTS

1. The Claimant's application for a Costs Order is refused.
2. Reasons for this decision are attached.

REASONS

BACKGROUND

1. At a remedy hearing held on 19 March 2021 the Claimant made an application for a Costs Order.
2. The Tribunal made a case management order requiring the Claimant to provide a written application for the Costs Order within 14 days and the Respondent to provide a written response within 14 days thereafter.
3. Neither party has requested a hearing and the Tribunal has therefore dealt with the application on the papers available provided by the parties.

RELEVANT RULES OF PROCEDURE

4. References to rules below are to Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

5. *Rule 75(1) - A costs order is an order that a party (the paying party) make a payment to - another party (the receiving party) in respect of the costs that the receiving party has incurred while legally represented or while represented by a lay representative;*
6. *Rule 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) have been conducted; or*
 - (b) any claim or response had no reasonable prospect of success.*
7. The Tribunal rules impose a two stage test. First the Tribunal must ask whether a party's conduct falls within rule 76(1)(a) or (b). If so, the Tribunal must then go on to ask whether it is appropriate to exercise the discretion in favour of awarding costs against that party.

RELEVANT CASE LAW

8. Yerrakalva v Barnsley Metropolitan Borough Council [2012] ICR 420.

The Court of Appeal confirmed that a Tribunal's power to order costs is more sparingly exercised and is more circumscribed than that of the courts where the general rule is that costs follow the event. In Tribunals, costs orders are the exception rather than the rule. In most cases the Tribunal does not make any order for costs and if it does, it must act within the rules that confine its powers to specified circumstances. The vital point in exercising the discretion to order costs is to look at the whole picture. The Tribunal has to ask whether there has been unreasonable conduct by the paying party in bringing, defending or conducting the case, and, in doing so, identify the conduct, what was unreasonable about it, and what effect it had.

9. McPherson v BNP Paribas [2004] ICR 1398. In determining whether to make an order under the ground of unreasonable conduct, a Tribunal should take into account the "*nature, gravity and effect*" of a party's unreasonable conduct.
10. Osannaya v Queen Mary University [2011] EAT 0225/11. The use of the word "unreasonable" requires a high threshold to be passed when a costs order is made.

CLAIMANT'S APPLICATION

11. The Claimant provided a written application dated 31 March 2021. It claimed legal costs amounting to £1,809 for work done in consequence of the Respondent's unreasonable conduct in failing to comply with the Tribunal's case

management orders of 19 June 2020, 6 December 2020 and 14 February 2021. The application was fully particularised and a schedule of costs was attached. Copies of correspondence sent to the Respondent's legal representative were attached.

RESPONDENT'S RESPONSE

12. The Respondent did not provide a response to the Claimant's application until 19 October 2021. It pointed out that the Respondent did comply with the case management order dated 19 June 2020, albeit after the due date of 2 October 2020. It provided a counter schedule of loss to the Claimant and to the Tribunal on 26 January 2021 some 2 months before the remedy hearing listed on 19 March 2021. The Respondent's e-mail stated:

"Please find attached the Respondent's counter-schedule of loss. The parties are now prepared to attend the remedy hearing in March 2021. As the main remedy issue relates to the Claimant's loss of earnings in respect of her dismissal claim the only evidence that is required is from the Claimant. A remedy bundle and witness statement have been received on this matter. We can confirm that the Claimant's representative has been copied into this e-mail."

DECISION

13. Having considered the Claimant's application for a Costs Order, and the Respondent's response to the application, the Tribunal found that looking at the whole picture, the Respondent had not acted unreasonably in failing to comply with the Tribunal's orders or in the conduct of the proceedings. Nor could it find any vexatious, abusive or disruptive conduct.

14. It is clear from the detailed account given in the application that the Respondent's representative has been tardy in complying the Tribunal's orders and has failed to respond on several occasions to correspondence from the Claimant's representative and from the Tribunal. That, however, falls short of the high threshold of unreasonable conduct, particularly in view of the fact that the Respondent did in fact comply with the case management orders, albeit after the due date, some 2 months before the remedy hearing when it appears all preparation had been completed. The listed remedy hearing was not delayed and there was no apparent prejudice to the Claimant in respect of the remedy hearing.

15. The Claimant acknowledged in the Costs application that it had received the counter schedule of loss on 26 January 2021.

16. The Respondent's counter schedule of loss was detailed and disclosed the Respondent's factual and legal arguments it would advance at the remedy hearing. Both parties were legally represented at the hearing.

17. The Claimant's application for a Costs Order is refused.

I confirm that this is the Tribunal decision in the case of Mrs K Pilgrim v Jasmine Care (Holdings) Limited case no. 3307346/2018 and that I have signed by electronic signature.

Employment Judge Vowles

Date: 21 October 2021

Sent to the parties on:

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For the Tribunals Office