



EMPLOYMENT TRIBUNALS

Claimant

Ms S Vladimirova

v

Respondent

The Commissioner of Police
of the Metropolis

Heard at: Watford (by CVP)

On: 6 September 2021

Before: Employment Judge Hawsworth
Mr M Bhatti
Mr A Scott

JUDGMENT (COSTS)

The unanimous judgment of the tribunal is:

1. The respondent's application for an award of costs succeeds.
2. The claimant is ordered to pay the respondent's costs in the sum of £2,500.

REASONS

The claim and judgment

1. The claimant was employed by the respondent from 15 April 2013 to 17 May 2018. She was a public access officer.
2. The claimant's claim was presented on 28 April 2018 after a period of Acas early conciliation from 26 February 2018 to 26 March 2018. The response was presented on 14 June 2018. The respondent defended the claim.
3. The liability hearing took place on 14, 15, 16, 17 and 18 September 2020. The tribunal gave judgment on 18 September 2020. The tribunal decided that the claimant's complaints of constructive unfair dismissal, direct discrimination because of disability and/or race, indirect disability discrimination, harassment related to disability and/or race, and victimisation failed and were dismissed. The claimant's complaint regarding holiday pay was withdrawn at the hearing and was also dismissed.
4. Written reasons were requested and these were sent to the parties on 16 November 2020.

The application for costs and the claimant's response

5. The respondent made an application for costs on 4 December 2020. The respondent says that the claimant acted unreasonably in bringing the proceedings (or part) or in the way that the proceedings have been conducted, and/or that the claim had no reasonable prospect of success.
6. The respondent relies on a without prejudice save as to costs proposal which was made on 9 September 2020, after exchange of witness statements and before the start of the liability hearing. The respondent offered not to pursue a claim for costs if the claimant withdrew her claims. The claimant did not accept the offer.
7. In response to the respondent's application the claimant's solicitor served written representations on 15 January 2021, with supporting documents including bank statements, GP letters and other letters in support. Two additional witness statements were provided on 22 January 2021.
8. On 23 May 2021 the tribunal asked the respondent to comment on the claimant's suggestion that the costs application be dealt with on the papers, rather than at a hearing. The respondent wrote to the tribunal and the claimant on 7 June 2021 to agree with the claimant's suggestion. The tribunal agreed with the parties that in the interests of proportionality and saving costs, the application could be dealt with without the parties attending a hearing.
9. Updated bank statements were provided by the claimant on 22 June 2021.
10. On 28 July 2021 the respondent made further written submissions in response to the claimant's representations.
11. On 25 August 2021 the claimant provided a further statement and response to the respondent's further submissions.
12. The costs application was considered by the full tribunal panel which had decided the claimant's claim. The tribunal met in chambers (by CVP) on 6 September 2021.

The law

13. The power to award costs is set out in the Employment Tribunal Rules of Procedure 2013. Under rule 76(1) a tribunal may make a costs 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 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.”

14. Rules 74 to 78 provide for a two-stage test to be applied by a tribunal considering costs applications under Rule 76. The first stage is for the tribunal to consider whether the ground or grounds for costs put forward by the party making the application are made out. If they are, the second stage is for the tribunal to consider whether to exercise its discretion to make an award of costs, and if so, for how much.
15. In determining whether unreasonable conduct under rule 76(1)(a) is made out, a tribunal should take into account the 'nature, gravity and effect' of a party's unreasonable conduct (McPherson v BNP Paribas (London Branch) 2004 ICR 1398, CA). However, it is not necessary to analyse each of these aspects separately, and the tribunal should not lose sight of the totality of the circumstances (Yerrakalva v Barnsley Metropolitan Borough Council 2012 ICR 420, CA). At paragraph 41 of Yerrakalva, Mummery LJ emphasised that:

“The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it has.”

16. When assessing whether the 'no reasonable prospect of success' ground in rule 76(1)(b) is made out, the test is not whether a party had a genuine belief in the prospects of success. The tribunal is required to assess objectively whether at the time it was brought, the claim had no reasonable prospect of success, judged on the basis of the information known or reasonably available to the claimant, and what view the claimant could reasonably have taken of the prospects of the claim in light of those facts (Radia v Jefferies International Ltd EAT 0007/18).

Conclusions

Are there grounds for a costs order?

17. We first need to consider whether there are grounds for a costs order under rule 76(1)(a) or (b).
18. We have concluded that some parts of the claimant's claim (some complaints) had no reasonable prospect of success:
 - 18.1 The complaint of constructive unfair dismissal was based on a last straw event which the claimant said took place in April 2018, shortly before her resignation on 19 April 2018. However this event actually took place much earlier, around five months before her resignation. The claimant accepted at the hearing that the event she relied on as a last straw in fact took place in November 2017.
 - 18.2 The only basis on which the claimant advanced complaints of direct race discrimination and harassment was because she is Bulgarian and she thought one of her managers was Turkish. She said there were historic tensions between Bulgaria and Turkey arising from the

fact that Bulgaria was under Turkish occupation for 500 years. However, the claimant accepted in her evidence that her manager was not in fact Turkish. The race discrimination and harassment complaints were based on an incorrect assumption made by the claimant about her manager's nationality.

- 18.3 The complaint of indirect discrimination was based on two provisions, criteria or practices (PCPs), both which said that the claimant was treated differently to others. The nature of a PCP is that it is applied or would be applied to those who do not share the claimant's protected characteristic, not just to the claimant. Neither of the PCPs relied on by the claimant could have amounted to a PCP, meaning that there was no prospect of success in the complaint of indirect discrimination.
19. The claimant had legal representation when she brought her claim (and throughout these proceedings). She would have been advised on the merits of her complaints. At the time the claim was brought, it should have been apparent to the claimant on the information which was available to her that the complaints of constructive unfair dismissal, direct race discrimination and harassment and indirect discrimination had no reasonable prospect of success. We have concluded therefore that rule 76(1)(b) applies in relation to these complaints.
20. Further we have concluded that the merits of these parts of the claimant's claim were such that it was unreasonable for her to continue to pursue these complaints after the respondent's offer of 9 September 2020. That letter came after exchange of documents and witness statements. The letter should have prompted further consideration of the prospects of success in the light of all the evidence that was available to the claimant by then. If proper consideration had been given to the merits of these complaints in light of the respondent's letter, it should have been apparent at that stage that those complaints had no reasonable prospect of success. Pursuing these complaints after that date was unreasonable conduct of the proceedings, which means that rule 76(1)(a) also applies.
21. We have not reached the same conclusions in relation to the complaints of disability discrimination and victimisation. Although those complaints did not succeed, we consider that they had greater prospects of success than the others, especially in light of the detailed findings of the respondent's grievance handler.

Exercise of discretion

22. We have found that there are grounds to make a costs order against the claimant in respect of some parts of her claim, and so we go on to consider whether to exercise our discretion to make an order. In doing so, we have in mind that costs are the exception in the employment tribunal, not the rule, and that they are compensatory not punitive.

23. We have also taken into account the information the claimant has provided about her ability to pay a costs order. She relocated to Cyprus in December 2020. She is currently unemployed and is of limited means. She has been awarded Personal Independence Payment (PIP) for the period from 8 March 2019 to 13 February 2022.
24. We have considered whether the claimant's financial situation is likely to improve. The claimant is 49. She says she is unable to work and does not know how long she will be unable to work. She provided medical letters from 2018 and 2019 which record that the claimant was under workplace stress while working for the respondent, and a GP fit note for stress and anxiety for the period 22 October 2020 to 20 November 2020. She has been found to have some restrictions entitling her to PIP and these are ongoing.
25. However, we were not provided with any medical evidence to suggest that the claimant is currently unable to work for medical reasons or that she will be unable to work for medical reasons in future. We conclude that it is likely that the claimant will be able to work in future, meaning that her financial position will improve in the future. We also take into account that any order which we make will be subject to enforcement by the County Court, which will consider whether payment in instalments should be required and will review the claimant's means when deciding the appropriate level of instalments.
26. The claimant had legal representation when she brought her claim and throughout proceedings. She was given a costs warning by the respondent and therefore would have known that there was a risk that she may have to pay some of the respondent's costs if her claim did not succeed.
27. Taking these factors into account, we have concluded that we should make a costs order.

The amount of the order

28. We have gone on to consider the amount we should award.
29. The respondent seeks costs of £14,677.17 plus VAT. These costs relate to the period from 11 September 2020 when the respondent's offer not to pursue costs expired.
30. The schedule relates to the respondent's costs in full for that period. We have concluded that we have grounds to make a costs order in respect of some of the claimant's complaints, but not all. Only a proportion of the respondent's costs were incurred in relation to those complaints. Further, there was some overlap between some of the complaints, such as the disability discrimination and harassment complaints and the race discrimination and harassment complaints, meaning that some of the respondent's costs would still have been incurred even if the claimant had not pursued those complaints we have identified as having no reasonable prospect of success. However, the inclusion of those complaints led to a longer hearing than would otherwise have been required.

31. We have also taken into account again at this stage the claimant's ability to pay. We have reached the conclusion that there is a realistic prospect that the claimant will be able to pay a costs order in future when she is able to resume employment, but, bearing in mind her pay with the respondent and the likely level of work she will be able to secure, it is unlikely that she will be able to meet a substantial payment.
32. We have therefore concluded that a costs order of £2,500 should be made. This is a fair contribution to the costs the respondent has incurred, bearing in mind the claimant's position.

Employment Judge Hawksworth

Date: 10 December 2021

Sent to the parties on:

13 December 2021

For the Tribunal Office