



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss A Prosser

**Respondent:** Community Gateway Association Ltd

**Heard at:** Manchester

**On:** 21 September 2021  
(In Chambers)  
No parties present

**Before:** Employment Judge Warren  
Mr Smith  
Ms Khan

## JUDGMENT

The unanimous judgment of the Tribunal is that the respondent's application for costs is dismissed.

## REASONS

### Background

1. This was an application by the respondent for a Costs Order against the claimant under the Employment Tribunal Rules of Procedure 2013, specifically Rule 76(1)(a) and/or (b) of the Rules on the grounds that the claimant's claim had no prospect of success and her conduct in bringing and continuing with her claim amounted to unreasonable conduct.
2. By an ET1 presented on 4 September 2020 the claimant, who was engaged by the respondent as a Relief Independent Living Advisor/Responder, claimed that she had been discriminated against whilst pregnant and when she submitted a grievance, was victimised.
3. The allegations were made in response to the measures undertaken by the respondent following government guidance and in response to the Covid 19 global pandemic. A two-day hearing on 1 and 2 March 2021 (followed by a deliberations day on 6 April 2021 in Chambers) led to the issuing of a judgment on the 14 May 2021 confirming the claimant's claims were dismissed in full. A judgment with reasons was promulgated.

4. On 6 November 2020 the respondent's representatives had written to the claimant setting out their assertion that the claim had no reasonable prospects of success. She was warned that the respondent would be advised to seek a Costs Order if her claim failed. She was urged to take legal advice.

### The Law

5. Rule 76(1)(a) and (b) of the ET rules pursuant to Rule 76(1):-
  - (i) 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 parties' 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 has no reasonable prospect of success.
6. The case of **Jonathan Hamilton-Jones -v- Angus Black EATS/0047/04** paragraph 8 an Employment Tribunal must assess objectively whether the claim had any prospect of success at any time of its existence. **Scott -v- Inland Revenue Commissioners Development Agency 2004 ICR 1410 CA** per Lord Justice Sedley a key question in determining whether a claim had no reasonable prospect of success is not whether a party thought he or she was in the right but whether he or she had reasonable grounds for doing so.
7. An award for costs for unreasonable conduct involves a two-stage process. A finding of unreasonable conduct and separately the exercise of discretion in making an award for costs.
8. The Employment Tribunal is to consider the whole picture of what happened in the case to establish whether the claimant's conduct has been unreasonable. Decisions on costs serve as no more than a broad steer on the factors covered by the paramount principle of relevance – **Barnsley Metropolitan Borough Council -v- Yerraklava (2011) EWCA Civ 1255** at paragraph 42.
9. **AQ Limited -v- Mr J A Holden UKEAT/0021/12/CEA** at paragraphs 32 and 33. Some litigants in person are found to have behaved vexatiously or unreasonably even when proper allowance is made for their inexperience and lack of objectivity.
10. The Employment Tribunal must have regard to the nature, gravity and effect of the unreasonable conduct as facts relevant to the exercise of its discretion. **McPherson -v- BNP Paribas (London branch) 2004 EWCA Civ 569** per Lord J Mummery at paragraph 40. The respondent does not have to prove that specific unreasonable conduct by the claimant caused particular costs to be incurred. Rule 84 of the Employment Tribunal rules in deciding whether to make a Costs Order and if so, in what amount, the Employment Tribunal may have regard to the paying parties' ability to pay. **Casqueiro -v- Barclays Bank UKEAT/0085/12** suggests that if a party subject to a costs application wishes to rely upon limited means such evidence should be adduced with

some degree of formality. **Vaughan -v- Lewisham LBC (2013) IRLR 713** even though the Tribunal thought it right to have regard to the appellant's means it did not require it to make a firm finding as to the maximum that it believed could be paid either forthwith or at some specified timescale and then to limit the award to that amount. If there is a realistic prospect that the claimant may at some point be able to afford to pay a substantial amount it is legitimate to make a costs order in that order.

### Hearing

11. The respondent applied for the hearing to be dealt with in the absence of the parties and on paper so as to limit the costs in the matter. The Tribunal considered that to be a proportionate way and agreed. The Tribunal had the benefit of a fully argued costs application in writing filed by the respondent. Ms Prosser emailed the Tribunal to indicate that she objected to the application of costs, she was seeking legal advice and would follow it up as a matter of urgency. By 14 July she had not provided a full response to the application for costs, she was invited to make written representations if she so chose to do serving them on the respondent and the Tribunal by 4 August and in any event she was ordered to provide a short statement of means with her income and expenditure, details of savings and debts, and providing paper proof where possible on or before 4 August 2021. By the hearing date of 21 September 2021, the Tribunal had heard nothing more and we took the decision to proceed on the assumption that the claimant did not want to make further representation.

### Submissions

12. The only submissions from the claimant were that she objected to the respondent's application. The respondent's application set out the law as cited above and sought a Costs Order against the claimant specifically under Rule 76(1)(a) and/or (b).
13. The respondent sought to persuade the Employment Tribunal to exercise its discretion to grant the application for costs on the basis that the claimant brought claims that had no reasonable prospect of success and/or she acted unreasonably in bringing the claims and/or she acted unreasonably in the way the proceedings had been conducted by continuing with her claim after weaknesses in her case had been highlighted to her in the respondent's warning letter.
14. Dealing firstly with the suggestion that the case had no reasonable prospects of success – the respondent asserted that the claimant's pregnancy discrimination claim was based on arguments which had little or no factual or evidential basis and which were roundly rejected by the Employment Tribunal. On 17 March the respondent had taken the decision that the claimant as a pregnant woman was vulnerable to Covid 19 and told not to return for a period of twelve weeks. In the judgment the Tribunal found that as a matter of fact the claimant was not told she would be away from work for twelve weeks; she was sent home due to being classed as vulnerable. It was found not to be unfavourable treatment; it was treatment which was appropriately informed through the requirements placed on the respondent as a result of the

Government's public health advice. The respondent paid her for the average of the shifts she had worked leading up to her being sent home and went further than that, including training days, for which she had been paid as well.

15. The claimant claimed that she knew she was not being supported by the respondent when she wasn't paid on 15 May. We found that the respondent had made a mistake in not paying the claimant for the shifts that she expected to be paid for but they did subsequently pay them when it was realised that this was a mistake. They paid generously beyond the hours of her zero hours contract. The Tribunal found on the face of it that the late payment was unfavourable treatment, but we did not find as a matter of fact that this was because of her pregnancy. It was because of a mistake made by the respondent which was subsequently generously dealt with by them.
16. The claimant asserted that she was only made eligible to do one morning (morning advisor role) out of a potential six shifts every day because she was pregnant. We found that the claimant was told she was eligible for the day shifts, either in the morning or afternoon as an advisor not a responder but for perfectly legitimate reasons to protect her and her baby. Night shifts were not made available to her for the same reasons. This was to protect the claimant and her unborn baby not to discriminate against her.
17. Other team members who had been classed as clinically vulnerable were permitted to work less than two metres apart, but the claimant could not return to work until social distancing could be maintained. As a matter of fact, the Tribunal found the respondent was trying hard to ensure that adequate social distancing measures were put in place but struggled to obtain, for instance, Perspex screens. We found it to be a positive step being taken to protect her in complying with legislation.
18. The claimant's victimisation claim was based on the following arguments. The claimant was told that she was entitled to statutory maternity pay but subsequently, after she had submitted a grievance she was told that she was not entitled to SMP and she was further denied birthday leave or pay in 2020. She said because she had raised a grievance. The Tribunal found as a matter of fact that a mistake had been made over the payment of the birthday day off to zero hours contracts and they were not entitled to it under the terms of their contract. The respondent was simply clarifying this to the claimant and then to all other zero hours workers. It had been paid by mistake in the previous year. The claimant was also told that she was not eligible to receive maternity pay, which was accurate. She had relied on something she was told by a member of staff and we decided that she misunderstood what was said. Neither the other member of staff nor any other zero hours contract worker had ever been given maternity pay that we were aware of. All the respondent was doing therefore was advising the claimant of her rights
19. As a result of the above the respondents submitted that the claimant's claims were misconceived and had no reasonable prospect of success. The claimant's claims were not based on any evidence giving rise to a reasonable ground for thinking she was right about them. Further, the respondent submitted that costs should be awarded because her conduct was unreasonable. In doing so they say that her conduct was compounded by the

fact she brought the claims against the respondent despite not having any real evidential basis to support them. In so doing, it would seem that the conducting of proceedings had been misconceived and/or had no reasonable prospect of success.

20. On 6 November 2020 the respondent sent to the claimant a detailed costs warning explaining that it believed the claim did not have a reasonable prospect of success and it was unreasonable for her to pursue it. She was warned in the letter that if she pursued her claim and was not successful the respondent would likely make a costs application against her and it strongly recommended that the claimant sought independent legal advice on the merits of her case. The claimant did not respond to the letter. The respondent reminded the Tribunal that we must have regard to the nature, gravity and effect of the unreasonable conduct as factors relevant to the exercise of its discretion. The gravity and effect was significant as the respondent had to defend its position in a two-day final hearing. It had to release employees, including the Deputy Chief Executive to give evidence, the costs would have borne to some extent by monies in the public purse. Sensible use had been made of the appropriate level of legal representation and the respondent was obliged to incur such costs to respond fully and comprehensively to the claim made.

#### **The claimant's representations**

21. The claimant only sent one email into the Tribunal indicating that she did not agree with this application.

#### **Our Findings**

22. Did the claim have no reasonable prospects of success. The claimant was a lay person, unrepresented and without legal support. She received the respondent's letter advising her of their view of her case and warning her of the risk of a costs' application. She did not have to accept their view of her case.
23. There were elements of her case which had considerable merit. It was not a foregone conclusion that she would have lost on every point. We have taken account of the situation at the time – Covid 19 was newly within our language, along with terms such as self-isolating, social distancing etc.
24. The claimant knew that she had not been paid what she was owed. She had to lodge a grievance to get that pay. The respondent knew she was pregnant at that time. She believed she had been sent home without pay because she was pregnant. At the time she had no reason to think differently. Similarly, in the previous twelve months regardless of the content of her written contract of terms of employment, she had received pay on the day of her birthday. This year she did not get pay on the day of her birthday, bearing in mind the problems she had already had over her pay she believed this was because she was pregnant and had lodged a grievance.
25. The claimant was originally told by another pregnant member of staff that both of them would receive statutory maternity pay. The way the comment was

made to her left her in a position where she probably misunderstood what had been said. This was not a case where the respondent did absolutely nothing wrong. Although issues were clarified she had already been left not knowing whether she was on furlough for twelve weeks (as she believed) or simply suspended on full pay (which nobody suggested at the outset) or sent home without pay which was the reality until she complained. From her perspective, she was sent home without pay because she was pregnant.

26. The respondent put things right in time. Unusually, at the time of the judgment on liability, the claimant was still engaged by the respondent and trying to sort things out with them.
27. In all of the above circumstances we do not find that the claim had no reasonable prospects of success, we do find that the respondent gave the claimant an adequate costs warning but we do not find that it was unreasonable conduct on behalf of the claimant to not only bring the claim but thereafter to continue with it, even once she was in receipt of the respondent's costs warning letter. We therefore conclude that the respondent's application for costs be dismissed.

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Employment Judge Warren

4 January 2022

JUDGMENT AND REASONS SENT TO THE PARTIES ON  
6 January 2022

FOR THE TRIBUNAL OFFICE

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