



EMPLOYMENT TRIBUNALS

Claimant: Ms Douglas-Brown

Respondent: Rosedene Nursing Home

Heard at: London South **On: 1 July 2022 (in Chambers)**

Before: Employment Judge Khalil
Ms N O Hare
Ms T Bryant

JUDGMENT UNDER RULE 76

Unanimous Decision:

The respondent's application for Costs under Rule 76 (1) (a) is not well founded and fails.

Reasons

Background

1. This was an application for Costs from the respondent following the Tribunal's rejection of all of the claimant's claims for disability discrimination following the Hearing on 18, 19 and 20 October 2021.
2. The Tribunal gave an extempore Judgment on 20 October 2021.
3. The respondent's application was dated 21 October 2021.
4. The respondent was represented by Mr Hussein, Croner.
5. The claimant was a litigant in person.
6. The Tribunal had a statement of means from the claimant with supporting documents.

Relevant Findings of Fact

7. The claimant's claims for disability discrimination under S.13, S.15, S.19, S.26 and S.27 Equality Act 2010 ('EqA') were unanimously dismissed by an extempore Judgment delivered on the third and final day of the 3-day Hearing 18 to 20 October 2021.
8. The claim form had been settled by Merseyside Law. The claimant received legal support thereafter too and from her union representative, it appeared, intermittently, but she appeared at the Hearing as a litigant in person.
9. An application to amend the claim had been permitted on day 1 of the Liability Hearing, the Tribunal assessing there to be no prejudice in relation to what was a retrospective amendment, the respondent having essentially prepared for trial based on further and better particulars already served.
10. The respondent's application was set out in its letter dated 21 October 2021 under Rule 76 (1) (a). Although the narrative concluded with a 5-bullet application in respect of the manner in which the claimant had conducted the proceedings, the Tribunal found that the narrative up until then also contained an application relating to the bringing of the proceedings.
11. The five bulleted grounds were as follows:
 - Misled the Tribunal in relation to the alleged knowledge of the Respondent in relation to her MCTD.
 - Misled the Tribunal in relation to the claim that the Respondent's Ms Edwards made remarks that amounted to direct discrimination based on disability.
 - Misled the Tribunal in relation to the alleged inaccuracy of disciplinary meeting minutes.
 - Misled the Tribunal on the alleged failure to make reasonable adjustments for lateness based on MCTD and COPD.
 - Misled the Tribunal by reason of the alleged act of victimisation as being her dismissal. Indeed, The Tribunal did not accept that the Claimant had engaged in any protected acts for which she had been discriminated against.
12. The parties were content for the application to be determined in writing.

13. The claimant had submitted a budget sheet which confirmed her income in total is £1,171.65 per month made up of universal credit and child benefit.
14. Her outgoings are £1967.83. the Tribunal found nothing extra-ordinary in her expenses schedule, made up essentially of rent, utility bills and general personal subsistence costs and those of 1 dependent child.
15. Thus, the claimant has a monthly deficit of £796.18 per month.
16. The schedule also showed that at that time, the claimant had debts totalling £8,392 made up of utility bill arrears (£4,000) and overpaid benefits (£3,000) and some rent and council tax arrears.
17. The claimant is inhibited from working in her part time job for London Care as, because of her COPD and MCTD, she is at increased risk of contracting Covid because of the need to go to the homes of service users.
18. The claimant's underlying conditions were not disputed during the Hearing as being qualifying disabilities under S. 6 EqA.
19. In respect of the respondent's knowledge of MCTD, the Tribunal found, at the Liability Hearing, that it was more likely than not, for reasons given, that the claimant did not discuss MCTD at her interview. The Tribunal did not find the claimant had misled the Tribunal however.
20. In respect of the allegation that Ms Edwards made remarks which amounted to direct discrimination because of disability, the Tribunal found, at the Liability Hearing, for reasons given, that this allegation was credible. The Tribunal did not find that the claimant had misled the Tribunal, however.
21. In respect of the allegation relating to the inaccuracy of disciplinary meeting minutes, the Tribunal was satisfied, at the liability Hearing, for reasons given, that the minutes were accurate. The Tribunal noted however that the minutes had not been sent to the claimant at the time and there was no outcome letter. The Tribunal did not find that the claimant had misled the Tribunal, however.
22. In respect of the allegation about the alleged failure to make reasonable adjustments for lateness based on MCTD and COPD, the Tribunal found, at the Liability Hearing, that none of the reasons asserted by the claimant contemporaneously for why she was late, related to her disabilities. On at least 4 occasions, she had referred exclusively to childcare. In its conclusions, the Tribunal said the entire thrust of the claimant's case was related to her childcare issues. Thus, the Tribunal did find the claimant's case misleading in this regard.
23. In respect of the allegation that the claimant's dismissal was an act of victimisation, the Tribunal found, at the Liability Hearing, for reasons given, that the claimant had never made verbal reasonable adjustments requests in

August, October and December 2017 and thus had not done any protected acts. The Tribunal did not find that the claimant had misled the Tribunal, however.

24. Prior to making its Costs application, the respondent had on 15 October 2021, written to the claimant stating that if she was to withdraw her claims, the respondent would not pursue a Costs application. No further information was provided.
25. The respondent had also, on 11 October 2021, written a Costs warning letter but this was in relation to the claimant's application to amend (which was determined in the claimant's favour) on day 1 of the Hearing.
26. There had been no prior application for a Deposit Order. Neither had the prospects of success formed part of any discussion at the Case Management Hearing.

Applicable Law

27. Rule 76 (1) says:

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.

28. In assessing whether a party has acted unreasonably, the Court of Appeal in ***Yerrakalva v Barnsley Metropolitan Borough Council and another 2012 ICR 420*** held the vital point in exercising the discretion 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.

29. The Tribunal should have regard to the nature, gravity and effect of the instance or instances of unreasonable conduct ***Mcpherson v BNP Paribas 2004 ICR 1398 EAT***.

30. Giving false evidence is an example of behaviour that might constitute unreasonable conduct having regard to the nature, gravity and effect of such conduct. ***Arrowsmith v Nottingham Trent University 2012 ICR 159***.

31. Where a Tribunal finds unreasonable conduct and exercises its discretion to make a costs order, there is no requirement to establish a causal link between the unreasonable conduct and costs attributable to that unreasonable conduct (**Yerrakalva**).

32. In relation to ability to pay, Rule 84 says:

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 (or, where a wasted costs order is made, the representative's) ability to pay.

Conclusions and analysis

33. Having regard to the Tribunal's findings above, the Tribunal concluded that the bringing of the disability discrimination claims was unreasonable as the claimant's multiple contemporaneous assertions about the reasons why she was being late (which led to her dismissal for persistent lateness), were rooted in her childcare issues, not her health.

34. The Tribunal has also found that in relation to the conduct of the proceedings, the claimant was unreasonable in misleading the Tribunal in relation to her lateness being down to the failure by the respondent to make reasonable adjustments because of the claimant's MCTD and COPD. That was not her case when she was employed.

35. In considering whether to exercise its discretion to make a costs Order, the Tribunal noted that the claimant was a litigant in person at the hearing but that she had received the benefit of legal advice when her claim was presented and thereafter.

36. The Tribunal also noted the precarious financial position of the claimant. The Tribunal concluded it was reasonable to have regard to her means as the claimant had substantial debt and this was aggravated by her considerable monthly deficit of just under £800. Her health conditions, which were not disputed by the respondent, have prevented her from undertaking her part time role because of the Covid risk. It was proportionate to have regard to the position as of December 2021 which was the date of the witness statement (on means) from the claimant.

37. The respondent has been represented throughout and it was very surprising that it had not applied for a Deposit Order or submitted a proper Costs warning letter.

38. The Tribunal was left with an overwhelming impression that the claimant had pursued the 'wrong' protected characteristic discrimination claim. The case before the respondent pre-Tribunal felt like a childcare/indirect sex discrimination complaint which never managed to manifest itself into a pleaded claim before the Tribunal.

39. Whilst the sum sought was not substantial having regard to this being a 3 day Hearing, there was no information before the Tribunal about why £1,000 was being sought and/or how that was arrived at. The basis /nature of the respondent's retainer was also not made known.

40. Bringing this all together, the Tribunal concluded, unanimously not to exercise its discretion to make a Costs Order.

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Employment Judge Khalil

08 July 2022